Judgments
# of the Administrative Tribunal of the International Labour Organization:

81st Session

(May-July 1996)

International Labour Office
Geneva

Judgments
# of the Administrative Tribunal of the International Labour Organization:
81st Session
(May-July 1996)

International Labour Office
Geneva

ISSN 0378-7362

First published in 1996

Annual subscription: 65 Swiss francs

CONTENTS

Judgment No.

1501 Cesari v. FAO
1502 Baillon v. CERN
1503 El Mahjoub v. ILO No. 5
1504 Mussnig (Application by the WHO for review of Judgment 1376)
1505 Simon v. WHO No. 2
1506 Delos v. UNIDO
1507 Morier v. UPU No. 2
1508 Glenn v. EPO No. 2
1509 Zhu v. UNIDO
1510 Antoinet No. 2 and Cuenca-Pérez v. CERN
1511 Baudet and Decressac v. CERN
1512 Bouvry v. CERN No. 2
1513 Fauquex v. WHO
1514 Aymon No. 2, Ball No. 3 and Borghini No. 3 v. CERN
1515 Antoinet No. 3, Aymon No. 3, Ball No. 4 and Borghini No. 4 v. CERN
1516 Greene-Chamberlain v. UNESCO No. 2
1517 Goettgens v. EPO No. 2
1518 Goettgens v. EPO No. 3
1519 Prados, Ramalingam, Tandart and Wright v. UNESCO
1520 López-Lahesa Nos. 1 and 2, Martin Nos. 1 and 2, Shackleford Nos. 1 and 2 and Tedjini Nos. 3 and 4 v. WTO
1521 Diotallevi No. 4 (Application by the WTO for interpretation of Judgment 1407)
1522 Bluske v. WIPO No. 5
1523 Malhotra (K.L.) v. WHO No. 4
1524 Rajagopal v. FAO
1525 Bardi Cevallos v. UNESCO
1526 Baigrie v. WHO
1527 Saunders v. ITU No. 15
1528 Saunders v. ITU No. 16
1529 Saunders v. ITU No. 17
1530 Haenni and Perruchi-Haenni v. OTIF
1531 Wassef v. FAO No. 9
1532 Wassef v. FAO No. 10
1533 Wassef v. FAO No. 13
1534 Wassef v. FAO No. 14
1535 Wassef v. FAO No. 24
1536 Raoof v. UNESCO
1537 Grosse Wiesmann v. CERN
1538 Grosse Wiesmann v. CERN No. 2
1539 Deakin v. EFTA
1540 Popineau v. EPO No. 9
1541 Popineau v. EPO No. 10
1542 Popineau v. EPO No. 11
1543 Popineau v. EPO No. 12
1544 Gery Pochon v. UNIDO
1545 Pary v. WIPO No. 5
1546 Randriamanantenasoa v. UNESCO
1547 Baillet, Cervantes and Cook No. 3 v. EPO
1548 Lee v. FAO
1549 López-Cotarelo v. IAEA
1550 Merchan v. PAHO

1551	Langelez v. CERN No. 4
1552	Langelez v. CERN No. 5
1553	Moreno de Gómez v. UNESCO
1554	Tögl v. EPO
1555	Viehböck v. EPO
1556	Leprince v. UNESCO No. 2
1557	Sethi v. WHO
1558	van Doremalen v. EPO
1559	Durand-Smet v. EPO
1560	Ndédi v. UNESCO
	Boland v. Eurocontrol No. 7 (withdrawal)
	Boland v. Eurocontrol No. 8 (withdrawal)
	Paulssen v. Eurocontrol (withdrawal)
	Sunnhagen v. EPO (withdrawal)

LIST OF JUDGMENTS IN ALPHABETICAL ORDER

Antoinet v. CERN No. 2: 1510
Antoinet v. CERN No. 3: 1515
Aymon v. CERN No. 2: 1514
Aymon v. CERN No. 3: 1515
Baigrie v. WHO: 1526
Baillet v. EPO: 1547
Baillon v. CERN: 1502
Ball v. CERN No. 3: 1514
Ball v. CERN No. 4: 1515
Bardi Cevallos v. UNESCO: 1525
Baudet v. CERN: 1511
Bluske v. WIPO No. 5: 1522
Boland v. Eurocontrol No. 7 (withdrawal)
Boland v. Eurocontrol No. 8 (withdrawal)
Borghini v. CERN No. 3: 1514
Borghini v. CERN No. 4: 1515
Bouvry v. CERN No. 2: 1512
Cervantes v. EPO: 1547
Cesari v. FAO: 1501
Cook No. 3 v. EPO: 1547
Cuenca-Pérez v. CERN: 1510
Deakin v. EFTA: 1539
Decressac v. CERN: 1511
Delos v. UNIDO: 1506
Diotallevi No. 4 (Application by the WTO for
  interpretation of Judgment 1407): 1521
Durand-Smet v. EPO: 1559
El Mahjoub v. ILO No. 5: 1503
Fauquex v. WHO: 1513
Gery Pochon v. UNIDO: 1544
Glenn v. EPO No. 2: 1508
Goettgens v. EPO No. 2: 1517
Goettgens v. EPO No. 3: 1518
Greene-Chamberlain v. UNESCO No. 2: 1516
Grosse Wiesmann v. CERN: 1537
Grosse Wiesmann v. CERN No. 2: 1538
Haenni v. OTIF: 1530
Langelez v. CERN No. 4: 1551
Langelez v. CERN No. 5: 1552
Lee v. FAO: 1548
Leprince v. UNESCO No. 2: 1556
López-Cotarelo v. IAEA: 1549
López-Lahesa v. WTO Nos. 1 and 2: 1520
Malhotra (K.L.) v. WHO No. 4: 1523
Martin v. WTO Nos. 1 and 2: 1520
Merchan v. PAHO: 1550
Moreno de Gómez v. UNESCO: 1553
Morier v. UPU No. 2: 1507
Mussnig (Application by the WHO for review of
  Judgment 1376): 1504
Ndédi v. UNESCO: 1560
Pary v. WIPO No. 5: 1545
Paulssen v. Eurocontrol (withdrawal)
Perruchi-Haenni v. OTIF: 1530
Popineau v. EPO No. 9: 1540
Popineau v. EPO No. 10: 1541

Popineau v. EPO No. 11: 1542
Popineau v. EPO No. 12: 1543
Prados v. UNESCO: 1519
Rajagopal v. FAO: 1524
Ramalingam v. UNESCO: 1519
Randriamanantenasoa v. UNESCO: 1546
Raoof v. UNESCO: 1536
Saunders v. ITU No. 15: 1527
Saunders v. ITU No. 16: 1528
Saunders v. ITU No. 17: 1529
Sethi v. WHO: 1557
Shackleford v. WTO Nos. 1 and 2: 1520
Simon v. WHO No. 2: 1505
Sunnhagen v. EPO (withdrawal)
Tandart v. UNESCO: 1519
Tedjini v. WTO Nos. 3 and 4: 1520
Tögl v. EPO: 1554
Viehböck v. EPO: 1555
van Doremalen v. EPO: 1558
Wassef v. FAO No. 9: 1531
Wassef v. FAO No. 10: 1532
Wassef v. FAO No. 13: 1533
Wassef v. FAO No. 14: 1534
Wassef v. FAO No. 24: 1535
Wright v. UNESCO: 1519
Zhu v. UNIDO: 1509

The Administrative Tribunal of the International Labour Organization (ILO) is competent to hear complaints against:

- International Labour Organization, including the International Training Centre
- World Health Organization (WHO), including the Pan American Health Organization (PAHO)
- United Nations Educational, Scientific and Cultural Organization (UNESCO)
- International Telecommunication Union (ITU)
- World Meteorological Organization (WMO)
- Food and Agriculture Organization of the United Nations (FAO)
- European Organization for Nuclear Research (CERN)
- General Agreement on Tariffs and Trade (GATT)
- International Atomic Energy Agency (IAEA)
- World Intellectual Property Organization (WIPO)
- European Organisation for the Safety of Air Navigation (Eurocontrol)
- Universal Postal Union (UPU)
- European Patent Organisation (EPO)
- European Southern Observatory (ESO)
- Intergovernmental Council of Copper-Exporting Countries (CIPEC)
- European Free Trade Association (EFTA)
- Inter-Parliamentary Union (IPU)
- European Molecular Biology Laboratory (EMBL)
- World Tourism Organization (WTO)
- African Training and Research Centre in Administration for Development (CAFRAD)
- Intergovernmental Organisation for International Carriage by Rail (OTIF)
- International Center for the Registration of Serials (CIEPS)
- International Office of Epizootics (OIE)
- United Nations Industrial Development Organization (UNIDO)
- International Criminal Police Organization (Interpol)
- International Fund for Agricultural Development (IFAD)
- International Union for the Protection of New Varieties of Plants (UPOV)
- Customs Co-operation Council (CCC)
- Court of Justice of the European Free Trade Association (EFTA Court)
- Surveillance Authority of the European Free Trade Association (ESA)

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FIRST SESSION

In re CESARI Judgment 1501

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Vezio Cesari against the Food and Agriculture Organization of the United Nations (FAO) on 24 November 1994 and corrected on 26 April 1995, the FAO's reply of 18 August, the complainant's rejoinder of 18 October, the Organization's surrejoinder of 7 December 1995, the complainant's further submissions of 11 March 1996 and the Organization's comments thereon of 10 April 1996;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Italian who was born in 1940, joined the FAO on 30 December 1967 as a messenger at grade G.1 at the Organization's headquarters in Rome. From 15 December 1982 to 30 May 1990 he was employed as a clerk at grade G.5.

On 1 June 1990 the FAO transferred him to the Field Programme Development Division (DDF) and gave him a field assignment in the Yemen as from 1 April 1991. On 1 September 1992 it transferred him from the Yemen to the office of the FAO's Representative in Teheran as an administrative officer at grade P.2. He was to hold that grade while in Iran: the assignment was originally for seven months but was extended until 31 March 1994.

From 1 June 1993 he was on sick leave in Rome. By a letter of 6 June to the Senior Adviser of the Decentralization Support Unit (DDFO) the FAO's Representative in Iran, Mr. W.J. Collett, asked that the complainant be recalled to headquarters in his own and the Organization's interests. By a memorandum of 24 June the officer-in-charge of the Personnel

Division told the complainant that Mr. Collett did not want him to go back; that his "behaviour and responsibility on this issue" would be reviewed, "relevant action" would be taken in due course and he was transferred to headquarters forthwith. By memoranda of 13 July to the chief of the Personnel Policy and Entitlements Service (AFPE) and of 21 July to a personnel officer he asked why he was transferred.

On 22 July he returned to Iran to arrange for departure. As soon as he got back to Rome the chief of AFPE informed him in a memorandum of 9 August that the effective date of transfer was that very day, that his grade would be G.5 and that the Organization would continue to look for a post for him.

By a memorandum of 20 August to the chief of AFPE he claimed compensation for the financial losses he had incurred on transfer to headquarters and the repayment of education expenses for his daughter, who was at school in Rome. He again asked about the reasons for transfer. By a memorandum of 13 September the chief of AFPE sent him a copy of a report of 26 July by Mr. Collett. It gave an account of the incidents that had prompted Mr. Collett to propose his transfer: he had, it said, been seen several times between January and April 1993 in the company of Mr. Collett's secretary, an Iranian woman; since it was an offence against Iranian custom for a woman to be seen in public with a man other than her husband or a close relative the Government of Iran had asked that the complainant leave the country. In a memorandum of 17 September the complainant sent the chief of AFPE some "clarifications" of Mr. Collett's account of what had happened.

On 24 September 1993 the complainant wrote to the Director-General claiming compensation for the financial losses he had incurred and the grant of grade P.2 on his transfer to headquarters. In reply to his memoranda of 20 August and 17 September the chief of AFPE informed him in a memorandum of 29 September that the FAO was not liable for the consequences of transfer and would not meet his claims. By a letter of 22 October the Assistant Director-General in charge of the Administration and Finance Department informed him of the rejection of his claims of 24 September.

By a memorandum of 23 November the complainant lodged an appeal with the Appeals Committee against the decision of 22 October. The Committee reported on 29 June 1994. It held that the FAO had acted by the rules and recalled the complainant to headquarters in its own interests. It recommended rejecting his claims. In a letter of 29 August 1994 - the impugned decision - the Director-General endorsed the recommendation.

B. The complainant states that he is challenging, not his transfer to headquarters, but the injury it caused him.

First, he alleges that the effects of the decision are tantamount to hidden disciplinary action. Since the Organization failed to bring disciplinary proceedings, it denied him the procedural safeguards in paragraph 330.13 of the FAO Manual.

Secondly, he submits that the Organization failed in its duty to respect his dignity and caused him unnecessary and undue injury. The transfer to headquarters caused him heavy financial loss: his pay fell because he was relegated from P.2 to G.5, and the Organization refused him the education grant and the lump-sum portion of the assignment grant. Precedent requires an organisation to give its staff genuine duties; instead the FAO left him idle for months after his recall and made no real effort to find him a post. His transfer has ruined his career and damaged his professional reputation. His wife, who is also with the FAO, left him on learning the reasons for his transfer.

He asks the Tribunal to quash the decision of 29 August 1994 and order the Organization to find him a secure post in keeping with his experience and qualifications and pay him damages for the financial losses he incurred on transfer - 1,600 United States dollars for having to sell his motor car and $2,000 for ending the lease of his flat - the education grant and the lump-sum portion of the assignment grant. He seeks moral damages equivalent to five years' pay at the rate of his last monthly salary in Iran, and costs.

C. In its reply the Organization submits that it had no reason to contemplate disciplinary action: the complainant's recall to headquarters was prompted by objections from the Iranian Government, not by any of its own. Besides, he did have his say in the internal appeal proceedings.

His own behaviour was the sole cause of his transfer and the "financial losses" he alleges. The FAO discharged its obligations by determining his entitlements on recall to headquarters. Though finding a post for a General Service staff member returning from the field is no easy matter, it found him work in March 1995 in the Forestry Department.

D. In his rejoinder the complainant objects to the Organization's "tendentious" account of the events that prompted his transfer to headquarters.

He maintains that the FAO is liable for the consequences, which amount to a sanction. Lodging an appeal did not make up for denial of the safeguards that disciplinary proceedings would have afforded.

E. In its surrejoinder the FAO argues that it merely did what it had to to safeguard its own and the complainant's rightful interests.

F. In further submissions the complainant observes that, though the FAO promised him a secure post, he has since 19 February 1996 been "on temporary loan" to the Budget and Finance Group on a two-month assignment.

G. In final comments the Organization states that it is still looking for a suitable post for him and that his employment at the FAO is safe.

CONSIDERATIONS:

The background

1. The complainant, who was born in July 1940, joined the FAO on 30 December 1967 as a messenger at grade G.1. From December 1982 to May 1990 he worked as a clerk at grade G.5 in the Office of Internal Audit. On 1 June 1990 the FAO transferred him to the Field Programme Development Division at the same grade, though it granted him a special post allowance at grade G.6. On 1 April 1991 it transferred him to the office of its Representative in the Yemen with temporary promotion to G.6 while he was there. A letter of 8 April 1991, which he countersigned, said that he had the right to return to headquarters at grade G.5. On 1 July 1991 he was appointed administrative officer in the Yemen and granted promotion to P.2 for as long as he stayed there. After a good start his performance tailed off. He was transferred to Teheran at 1 September 1992, still at grade P.2 for as long as the assignment might last. His performance proving satisfactory, his assignment was extended to 31 March 1994. There then occurred several incidents that are recounted below. At 9 August 1993 the Organization transferred him to headquarters at grade G.5. It felt it had to recall him from Teheran in his and its own interests because the Iranian Government had objected to his breach of local custom in being seen in public with a married woman in the absence of her husband or a member of the family. The transfer was intended to safeguard FAO work

in Iran and to remove him from the threat of reprisal. He is not challenging the actual transfer. His claims are set out in B above.

Receivability

2. According to Article VII, paragraph 1, of the Tribunal's Statute a complaint is not receivable unless all internal means of redress have been exhausted. One of the complainant's pleas is that on return to Rome he did not get the within-grade step increment due to him in May 1994. The claim is irreceivable because it formed the subject neither of the impugned decision nor of his internal appeal. Besides, as the Organization points out and as he acknowledges in his rejoinder, there was mere delay in paying the increment.

The merits

3. The complainant's first plea rests on the the case law: the Organization may not punish unsatisfactory conduct - as against unsatisfactory service - without following a disciplinary procedure that affords definite safeguards. He cites Judgment 247 (in re Nemeth). But he misreads that case. It was about action of a kind that might be properly deemed disciplinary, namely refusal of an increment for insubordination. The text actually says in 15 that a supervisor is not to be prevented, simply because there have been some acts of insubordination, from declaring service to be generally unsatisfactory. What the Tribunal will determine in each case is whether in the light of all the evidence the impugned decision may be treated as disciplinary action requiring the prescribed disciplinary procedure. It saw such action, for example, in summary dismissal for serious misconduct (Judgment 87, in re Di Giuliomaria, under 3), but not in the refusal to renew a fixed-term appointment (Judgment 1405, in re Moore, under 6), while transfer may amount to disciplinary action according to circumstance (Judgment 1496, in re Güsten, under 8).

4. The present complainant's quarrel is not with the actual transfer; nor does he disagree that it was in the Organization's and his own interests. What he is objecting to is just the Director-General's refusal to let him have compensation for the drop in pay due to his relegation from P.2 to G.5, to pay him part of the assignment grant, to meet the costs he incurred on premature recall to headquarters, and to grant him compensation for moral injury. His claims rest, not on any express provisions of the Staff Regulations, but on the general principle that an organisation must not cause its employees undue injury: see 5 below. In this narrower context the issue is whether the injury was attributable to the

Organization or to the employee. That is plainly not a disciplinary matter, and it does not call for the further safeguards that disciplinary proceedings afford. The ordinary procedure suffices to safeguard his rights in full. His plea therefore fails. For the same reasons so does his contention that the measure is unlawful because it amounts to disciplinary action that is not provided for in the Staff Regulations.

5. The complainant rests his case on the doctrine that action taken in the Organization's interests must still respect the staff member's dignity and not cause undue injury. So the Organization should - the argument runs - put him just where he would have been had it not transferred him prematurely in its own interests: though he is now back at headquarters it should pay him a salary equivalent to the P.2 pay he was earning in Iran, or at least the G.6 pay he was getting temporarily before he was sent to the Yemen. It should also pay him compensation for the financial loss he incurred in ending the lease of his flat in Teheran (2,000 United States dollars) and in the hasty sale of his car ($1,000). It should pay the costs of his daughter's schooling in Rome in 1993 (8,217,800 lire). He cites, among others, Judgment 832 (in re Ayoub and others).

There is no need here to define the right he claims to protection against undue injury since one condition of fulfilment is lacking: though transfer was ordered in the Organization's interests the reason for it was his own conduct.

6. The facts set out in A above are not in dispute. Before going out to Iran the complainant was briefed on the social precepts and customs - particularly about the place of women in society - which he must observe and which the Government of that country strictly enforces. The office of the FAO's Representative in Teheran was in the building of the Ministry of Agriculture and was watched right round the clock by guardians of the revolution. The Representative's Iranian secretary had an Iranian husband and lived with him near Teheran. The complainant says that his family and hers had struck up a friendship, his own wife having visited Teheran on holiday. While on holiday in January 1993 the Representative was told by telephone that she and the complainant had been seen together either on business at the airport or privately. In January 1993 the two turned up at the office but were refused admittance until someone came along from the Ministry. Back at the office the Representative spoke to them about the incident. The complainant went to Rome on leave on 17 March 1993; so did the woman, the next day, only to return to Teheran shortly after. On 14 April a representative of the Iranian Government asked for the complainant's removal. On 24 April he went back to Teheran. On 27 April the FAO's Representative saw the Deputy Director-General in Rome and talked about the trouble that the complainant's behaviour was

causing. On 6 May the Permanent Representative of Iran told the FAO that the Government was disturbed about the matter. The complainant says that in mid-May he got threats - though whether he told his supervisors is unclear - and for that reason changed his address in Teheran. At the time he applied for leave to go to Rome. He says that he wanted to allay any suspicions his wife might have on the matter and that she sought and got a divorce on the strength of information from the FAO that it should have kept confidential. He stoutly denies having an affair. In June 1993 the FAO's Representative asked the Organization to recall him.

7. It is plain on the evidence that the complainant knew the ethics of the host country and that his disregard of them aroused the resentment that prompted his transfer. What the consequences may have been for his private life is immaterial. The proper performance of his mission by an international civil servant requires him to avoid such infringement of the ethical rules of the host country as may hamper or prevent the discharge of duty. It must have been obvious to the complainant that any disregard of Iranian customs as to the place of a married woman in society would compromise the FAO's mission in Iran. His breach of those rules was conduct warranting transfer.

He does not contend that the transfer was unrelated to his own behaviour, and on that score he is right. So he may not treat the Organization as liable for the financial consequences of a decision for which he was solely to blame. His claims to compensation for a drop in pay and to damages for premature transfer are therefore without merit.

8. He puts forward the following arguments in support of his claim to moral damages. The impugned decision was unlawful - he says - and that in itself warrants an award; even if it were not unlawful the seriousness of the injury would warrant it: he cites Judgment 630 (in re Rudin No. 3). He submits that (1) in the appeal proceedings the Organization wrongly accused him of improper behaviour with a woman who was not his wife; (2) since his return to headquarters the Organization has not found him a secure and suitable job; (3) he did not even have his own office until February 1995 and has since been lodged in a storage area; (4) he did not get the salary increment due to him in May 1994; and (5) the Organization revealed confidential information about the incidents and his wife, on the strength of the Representative's account, among other things, sought and got a divorce.

There was nothing unlawful about the transfer as such. Contrary to what the complainant says, the FAO did not accuse him of having an affair but of offending in public against Iranian ethics and so undermining the Organization's work. It denies giving confidential information to any unauthorised third party. Although the complainant expresses surprise at his wife's knowing the "story" he fails to show how the Organization was to blame for that or what particular revelation brought about the divorce. His claim over tardy payment of an increment is irreceivable because he did not make it in his internal appeal, and the delay was not serious anyway. The Organization admits that on his return to Rome it gave him sundry jobs instead of lasting duties, but it explains that that was because his return was unexpected, no suitable post was available, and there was restructuring going on. In March 1995 it did assign him to the Forestry Department. In a further brief he points out that on 19 February 1996 he was lent for two months to the Budget and Finance Group. The difficulty of finding him a job at headquarters may be regrettable, and the Organization ought to find him steady work but there is no reason to suppose that it has missed any opportunity or wilfully kept him out of such work. The same is true about finding him an office. In any case the difficulties are to some extent due to his lack of success in the field, and on that score the Organization is not liable. In view of all the circumstances there are no grounds for awarding him moral damages and costs.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. Michel Gentot, Vice-President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

(Signed)

Michel Gentot Julio Barberis Egli

A.B. Gardner

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FIRST SESSION

In re BAILLON

Judgment 1502

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Paul Baillon against the European Organization for Nuclear Research (CERN) on 23 August 1995, CERN's reply of 27 October, the complainant's rejoinder of 27 November and the Organization's surrejoinder of 15 December 1995;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Regulation R VIII 1.01 of the CERN Staff Regulations states:

> "Claims for payment shall not be admissible after two years, except in the case of education grants, for which the period shall be one year, and other allowances, grants, indemnities or reimbursements, for which the period shall be six months.
>
> These periods shall run from the date on which the payment becomes due."

The complainant, who is a Frenchman, has been an employee of CERN since 1966. Under Regulation R IV 1.19 of the Staff Regulations he is entitled to an education grant for each of his three children.

By a memorandum of 31 August 1994 he submitted to the Personnel Division of CERN a claim to repayment of school expenses incurred from February to the end of August 1993. He said he was sorry for his "quite unintentional lateness": he had not known about the time limit of one year and had thought that he had to group claims as far as possible. By a memorandum of 19 September 1994 the Division answered that apart from a bill of August 1993 his claims were time-barred under R VIII 1.01; the time limit might be waived if the delay was due to reasons "beyond the control of the staff member"; and if there were any such reasons he should provide evidence of them. In an undated handwritten note he listed the dates at which he had been absent from CERN and so unable to fill up or hand in claim forms. The Division replied in a memorandum of 29 September 1994 that absence did not amount to force majeure within the meaning of paragraph IV.9 of Administrative Circular No. 7 on time limits.

By a memorandum of 23 September 1994 he had lodged an appeal with the Joint Advisory Appeals Board. In its report of 27 March 1995 the Board recommended meeting all his claims. It pointed out that "R VIII 1.01 ... in conjunction with the text of the claim form ... which allows claims to be grouped per term or per year, could mislead staff members". It was understandable, the Board said, that the complainant should think that the time limit ran from the end of a one-year period following his last claim; and "since the existing rules are not precise, time limits should be applied with flexibility so that staff members who exceed them slightly are not penalised disproportionately".

By a letter of 2 June 1995, the impugned decision, the Director of Administration rejected the appeal on the Director-General's behalf.

B. The complainant contends that he made his claims to school expenses in time and in accordance with R VIII 1.01. In his submission CERN requires staff to group such claims and so should waive the time limit, as point IV.9 of circular 7 allows. According to R A 9.08 only three claims to repayment may be made in any one year for each child, and further to a decision published in the CERN bulletin of 8 September 1986 claims must be either grouped so as to total at least 500 Swiss francs or submitted at the end of the school year if they come to a lesser amount. The claim form, which cites those rules, contains the headings "one claim per child" and "per term or per year". The complainant chose to make his claims once in the year and submits that the time limit should therefore have been held over to one year from the date of his last claim.

He asks the Tribunal to set aside the impugned decision and award him costs.

C. CERN replies that the complainant is being inconsistent: he now argues that his claim was not late; yet in his memorandum of 31 August 1994 he admitted to "quite unintentional lateness" and promised to act "in time" in future.

It is odd that, as he professed in the memorandum accompanying his claim, he should have been unaware of the one-year time limit: the Staff Rules and Regulations, circular 7 and the claim form all mention it.

The requirement that staff members should group claims is not force majeure. There was nothing to prevent the complainant from filing his claims to the repayment of expenses paid from March to July 1993 either at the end of the school year or at the end of the calendar year or at any other time within one year from the dates at which he had paid the bills. Besides, none of the bills he submitted comes to less than 500 Swiss francs.

Another inconsistency is that his memorandum of 31 August 1994 said that his claim was "for the period from February 93 to August 1993" whereas he now says that "the one-year period in question ... was ... from 1.2.93 to 31.1.94 for the school expenses" of his three children.

D. The complainant denies giving force majeure as the reason for his delay in filing. It was CERN that raised the issue, and he merely responded.

The one-year time limit in R VIII 1.01 applies to "claims for payment", and he gathers that it runs from the date at which all items are available for processing of the claim by CERN. The Organization should have amended R VIII 1.01 to make it clear that the year starts at the date at which a bill is paid. Since the application of the requirement that claims be grouped the one-year time limit has put the staff member in a "legal trap".

His claims did cover the period from February 1993 to the end of January 1994, even though the expenses were all incurred from February to August 1993. Why has CERN paid only the bill of August 1993? It should have processed all the bills as one.

E. In its surrejoinder CERN presses its pleas. It maintains that the rule about the grouping of school bills does not affect the application of R VIII 1.01.

CONSIDERATIONS:

The material facts

1. The complainant, who was born on 17 September 1938, has been employed by CERN as a physicist since 14 February 1966. He has three dependent children: Dominique, who is at the Federal Polytechnic College at Lausanne, in Switzerland; Alice, who attends the international secondary school at Ferney-Voltaire, in France; and François, a student at a national institute of applied sciences in Lyons. The Staff Rules entitle him to repayment of part of their school expenses. He says that for some ten years he filed claims in time and CERN met them.

2. Staff Regulation R IV 1.19 says:

> "A member of the personnel shall receive an education grant in respect of each dependent child attending an educational establishment full time."

The grant is as set out in Annex R A 9 to the Staff Rules and Regulations and Administrative Circular No. 12 on education grants. Annex R A 9.08 says that staff must group bills so as not to make more than three claims for each child in one year; Annex 2 to administrative procedure 2.15.2 requires "one claim per child (per term or per year)".

Regulation R VIII 1.01 sets time limits:

> "Claims for payment shall not be admissible after two years, except in the case of education grants, for which the period shall be one year, and other allowances, grants, indemnities or reimbursement, for which the period shall be six months.
>
> These periods shall run from the date on which the payment becomes due."

Circular 7, also on time limits, says that claims to the payment of education expenses must be made within one year, but it does not explain when the year begins.

The claimant fills up a form which says that no more than three claims may be made for each school year and for each child and are to be submitted preferably during the school year and within one year.

3. On 31 August 1994 the complainant sent the Personnel Division a memorandum claiming repayment of the following grouped expenses:

for Dominique Baillon, second half (ended 19 June 1993)	5,065.50 Swiss francs
for Alice Baillon, second half (up to 30 June 1993)	1,105.50 French francs
for François Baillon, third term (up to 30 June 1993)	3,289.50 French francs

By a memorandum of 19 September 1994 the Division refused his claims as out of time, the requirement that claims be grouped making no difference to the time limit in the Regulations. Only one item went through, for Dominique Baillon: "the rent for August 1993 may be repaid", said the memorandum, "because you suspended the time limit in August 1994 by your memorandum of 31 August". On the evidence the rent for August 1993 was payable in advance, by 1 August 1993, and the complainant paid it on 20 July 1993.

The complainant appealed. The Joint Advisory Appeals Board recommended meeting his claims in full and altering the rules on the processing of claims to make them clearer.

On 2 June 1995 the Director of Administration nonetheless rejected the appeal on the Director-General's behalf: he had no doubt but that the year ran from the date at which a staff member paid a bill, and the Organization's interest required strict observance of the time limit.

4. The parties maintain their pleas before the Tribunal. The gist of CERN's case is that the time limit runs from the date of payment of the bill and is not altered by the requirement that claims must be grouped. The complainant's argument is that since claims may not be separate the time limit starts when a group of them may be submitted according to one of the options the rules allow; or at least - he adds - that is how the rules may be honestly construed, and only in breach of good faith may CERN impose any other construction.

The merits

5. In his original claim the complainant admitted that, to go by what he had been told, he was out of time, but he sought indulgence on the grounds of his ignorance of the rule.

That admission does not estop him from pleading later, after looking into the matter, that his claim was not late after all. The plea is not in breach of good faith.

Though not himself misled by the wording of the rules, which he had been unaware of, he may still argue that the text can bear a construction different from CERN's and one that should prevail for being more favourable to the staff.

6. How then is the time limit to be construed?

(a) As CERN said in the impugned decision, its own interests and sound management demand strict compliance with time limits, and non-compliance means forfeiting a right or the exercise thereof: for observance of time limits, see Judgment 1446 (in re Saunders No. 13) under 3, the further judgments cited therein and Judgment 1485 (in re Wassef No. 7).

As CERN argues, a time limit is not to be waived just because claims are seldom late or because the consequences of refusing waiver would be too harsh.

(b) Yet time limits must be construed in good faith. If an organisation wants to put procedural restrictions on one of the staff member's rights or on the exercise thereof it must draft clearly enough to avoid setting traps. If it fails to do so, the text may be construed in the staff member's favour: see Judgment 1376 (in re Mussnig) under 13 and the judgment cited therein.

7. What was the dies a quo for reckoning the time limit the Organization set for claims by the complainant to his children's school expenses?

The texts afford no explicit answer. R VIII 1.01 says that the time limit "shall run from the date on which the payment becomes due". That is a general formula that applies to any right to be exercised within a time limit, including the present complainant's claims. It does not denote the due date for payment of the school expenses a staff member wants to recover.

Two questions therefore arise. Is the dies a quo the actual date of payment of the bill or does it depend on the school term to which the bill relates? And secondly, does the requirement that claims be grouped make any difference to the time limit?

8. On the first question, about the dies a quo, CERN's thinking seems to have wavered. Before the Tribunal the Organization consistently holds to the date of payment; but the Personnel Division's letter of 19 September 1994 rejecting the complainant's claims seems to find the school term relevant. Thus, as to Dominique Baillon's rent for August 1993 it referred to the school term, not to the actual date of the advance payment, which was earlier. Circular 7 is no more

helpful about claims to repayment of school expenses. For the other sorts of claim to repayment which it cites as examples, the dies a quo is not the date of payment: for expenses of travel on official business it is the date of return from travel, and for the costs of removal it is the date of the removal. CERN's interpretation, though it offers the tidiness of logic, may be neither suited to the particular case of repayment of school expenses nor in line with what circular 7 actually says about claims to other sorts of expenses. At all events claimants have ample room for doubt on the matter. In this case it is not in dispute that the complainant claimed within the one-year time limit the final payment for Dominique Baillon. So there is no reason to reject what the Organization has thereby allowed.

9. Opinion is split on the second question, about the effect, if any, of grouping claims. The Organization submits that the time limit for making a claim starts at the date of payment of each item of expenditure and that its requirement about the grouping of claims - which merely serves administrative convenience - makes not a whit of difference. The complainant retorts that repayment does not fall due under R VIII 1.01 as long as the rules bar the making of the claim, and that the requirement of grouping holds over the date at which repayment may be claimed.

The time limit must start at the date at which payment becomes due. If that were not so, the lapse of time would work to the claimant's detriment for as long as the rules precluded his making the claim. To make the would-be claimant wait, for any reason, before making the claim bars repayment. So the staff have grounds for supposing that they are not free to make claims until they can group. The complainant offers what is at least a tenable construction and for want of any more explicit guidance on the meaning of the time limit the staff may properly act on that construction. For CERN to impose a narrower one would be an abuse of authority.

That ruling, which the vague drafting of the present texts requires, does not harm any essential interests of the Organization, which may now issue straightforward and unambiguous provisions.

10. Contrary to what the complainant suggests, all that CERN requires is the grouping of claims for each child, not of claims for all the staff member's children, save where the total falls short of 500 Swiss francs. And in this case the total was above that figure.

Even if the construction to be put on the time limit is the one more favourable to the complainant was he in time in making the grouped claims for each of his children?

All the expenses for Alice and François Baillon were paid over a year before 31 August 1994, the date at which he made the claims to repayment: the material dates were 18 February and 25 May 1993 for Alice and 18 April 1993 for François. And they related, too, to a school half that ended at 30 June 1993, again over a year before the date of his claims. There was nothing to prevent his acting in time, and the claims for those two children are therefore barred.

11. As to Dominique Baillon, the letter of 19 September 1994 was right to say that the complainant's claim of 31 August to repayment of the latest expenses - the rent for August 1993 - was in time. But applying the construction more favourable to him means that at that date he was still in time to claim also the expenses incurred earlier because he was free to group them with the same claim. He says, and CERN does not deny, that he chose to group claims by year and not by school term. So those claims too must succeed.

12. Having won his case in part, he is entitled to costs.

DECISION:

For the above reasons,

1. The claims to repayment of the expenses incurred for Alice and François Baillon are dismissed.
2. The impugned decision is set aside insofar as it rejects the claim to the expenses incurred for Dominique Baillon.
3. The Organization shall pay the complainant 1,000 Swiss francs in costs.

In witness of this judgment Mr. Michel Gentot, Vice-President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

(Signed)

Michel Gentot Mella Carroll Egli

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

EIGHTY-FIRST SESSION

In re EL MAHJOUB (No. 5)
(Application for review)

Judgment 1503

THE ADMINISTRATIVE TRIBUNAL,

Considering the application filed by Mr. Mohamed El Mahjoub on 28 August 1995 for review of Judgment 1429;

Considering Article II, paragraph 1, of the Statute of the Tribunal and Article 7 of its Rules;

Having examined the written submissions;

CONSIDERATIONS:

1. This is an application for review of Judgment 1429 of 6 July 1995, which dismissed Mr. El Mahjoub's fourth complaint. In that complaint he had claimed from the International Labour Organization (ILO) compensation for an injury which he attributed to two accidents which he said occurred on the ILO's premises during working hours, one on 23 July and the other on 23 October 1991. The Tribunal held the complaint to be irreceivable in that he had not complied with the time limits laid down for internal appeal.

2. He now contends that the Tribunal ignored the correspondence between him and the secretary of the ILO's Compensation Committee and contradictions between a letter from the secretary and the Organization's pleadings. He repeats his argument that the Compensation Committee was "illegal" and therefore the Director-General's decision was too. He submits that the ruling that his complaint was irreceivable was "unfair and unjustifiable" and that the statement in the judgment that his appointment ended on 31 December 1991 is "not correct".

3. The Tribunal has often stated the strictly limited grounds on which its judgments may be reviewed. Examples are Judgments 442 (in re de Villegas No. 4) and 950 (in re Loroch No. 6).

4. What the complainant alleges is mistakes of law or in the appraisal of the facts: according to the case law neither constitutes an admissible plea for review. As Judgment 1429 said under 6, the refusal by the Director-General to meet his claim to compensation was notified to him in a letter of 28 May 1993. A letter of 18 August 1993 from the secretary of the Compensation Committee told him of his right to have a medical board appointed. He took no action until 28 February 1994, when he filed a "complaint" under Article 13.2 of the Staff Regulations. By then he was out of time.

5. As for the date at which his appointment ended, he was offered an extension, but the offer was conditional on his taking up a post at Tunis. When he refused to do so the offer lapsed and his appointment accordingly ended at the date of expiry, 31 December 1991. Besides, the matter is irrelevant to the issues ruled on in Judgment 1429.

6. Since the application is clearly irreceivable it must be summarily dismissed in accordance with Article 7 of the Tribunal's Rules.

DECISION:

For the above reasons,

The application is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Julio Barberis, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

Wm Douglas
William Douglas

Mella Carroll
Mella Carroll

Julio Barberis

A.B. Gardner
A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL — INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF — *ADMINISTRATIVE TRIBUNAL*

EIGHTY-FIRST SESSION

In re MUSSNIG (No. 2)
(Application by the WHO
for review)

Judgment 1504

THE ADMINISTRATIVE TRIBUNAL,

Considering the application filed by the World Health Organization (WHO) on 1 September 1995 for review of Judgment 1376, the reply of Mrs. Gabriele Mussnig of 20 December 1995, the WHO's rejoinder of 29 March 1996 and the complainant's surrejoinder of 16 April 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

CONSIDERATIONS:

1. In the complaint on which the Tribunal ruled in Judgment 1376 on 13 July 1994 Mrs. Mussnig challenged the decision of the Director-General of the WHO not to renew her appointment, on the grounds, among others, that the decision was tainted with personal prejudice arising out of sexual harassment by her supervisor, Dr. Emmanuel Eben-Moussi.

2. The Organization did not contest the complainant's account of the facts and in particular did not seek to refute her allegations against her supervisor. As the Tribunal observed in the judgment under 16, it might have submitted a written denial by Dr. Eben-Moussi but had not done so. The Tribunal held that it was able to rule on the merits of Mrs. Mussnig's complaint and it did so. It treated the complainant's uncontested allegations as proven, ruled in her favour, quashed the decision she was impugning and made ancillary orders including an award to her of 25,000 Swiss francs in moral damages. The matter thereby became res judicata.

3. In November 1994 the Organization appointed an "ad hoc grievance panel" to investigate the complainant's allegations of sexual harassment by Dr. Eben-Moussi. Its terms of reference were to -

> "submit a written report on its investigation directly to the Director-General, normally within two months from its establishment, recommending that:
>
> (a) Should the facts appear to indicate that sexual harassment occurred, or that Mrs. Mussnig knowingly made a false accusation against Dr. Eben-Moussi, and thereby committed an act of misconduct, the appropriate action should be taken, indicating the details and severity of the case.
>
> (b) Should the facts, as a result of the initial investigation, appear to indicate that sexual harassment has not occurred, and that Mrs. Mussnig has not committed an act of misconduct as described in a), the case should be closed."

4. The complainant refused to put written submissions to the panel or to appear before it. In a letter dated 8 December 1994 to the Director of the Personnel Division she said:

> "I fully reindorse [sic] the substance of my initial submissions to the Headquarters Board of Appeal as well as of my two submissions to the [Tribunal] ... I would wish to express serious doubts about the legitimacy of opening up the case to a second judgment, that refers the case from a higher instance, i.e. the ILO Administrative Tribunal, back to a lower instance, i.e. an ad hoc Panel constituted from the WHO Headquarters Board of Appeal."

The panel nonetheless went ahead.

5. On 8 June 1995 the panel submitted its report to the Director-General. In a statement in response, of which he sent copies to Mrs. Mussnig and to Dr. Eben-Moussi on 10 July 1995, he said that he "noted that there are significant contradictions between the Panel's conclusions and the allegation of sexual harassment, and that the Panel's findings could support the view that Dr. Eben-Moussi did not commit sexual harassment".

6. The WHO's present application invites the Tribunal to consider further its judgment in relation to the alleged sexual harassment of the complainant by Dr. Eben-Moussi. In its original brief the Organization does not indicate the grounds on which it is asking the Tribunal to review its judgment. In its rejoinder, however, it says: "a reliance of the finality of Judgment 1376 would be unjust, particularly in respect of Dr. Eben-Moussi who, although not a party to the case, was

named by the Tribunal as being a perpetrator of sexual harassment". It comments:

> "By considering Judgment 1376 further, the Tribunal would have an opportunity to consider the Panel's report as it relates to Dr. Eben-Moussi. Mrs. Mussnig would also have an opportunity to comment on or rebut the report in the proper forum."

7. That is tantamount to asking the Tribunal to ignore its earlier findings of fact and reconsider the allegations of sexual harassment on which it has already ruled, and in the complainant's favour.

8. The Tribunal has stated many times that it will review a judgment only in exceptional cases and then only on limited grounds. Pleas which may be admitted are failure to take account of specific facts, material error - i.e. a mistake in finding of fact which does not involve any value judgment and is therefore distinguishable from misappraisal of the evidence - failure to rule on a claim and the discovery of some new fact - i.e. a fact which one of the parties was not able to rely on in the proceedings that culminated in the judgment.

9. Pleas about failure to take account of specific facts, material error and failure to rule on a claim have no relevance to the Organization's application. Neither has discovery of a new fact. For a plea alleging such discovery to succeed the fact must be one that the Organization could not reasonably have been expected to discover in time and plead in the original case. The report of the WHO's ad hoc grievance panel cannot be treated as such a fact. There was nothing to prevent the Organization from getting in touch with Dr. Eben-Moussi in the course of the pleadings on that case to ask for his own account; and it offers no explanation as to why it did not do so. The Organization was vicariously liable for his actions. It was up to the Organization as defendant to present its case as best it could in refutation of the complainant's claim. If it failed to approach Dr. Eben-Moussi it must bear responsibility for such failure. As far as the complainant is concerned, she succeeded in her claim on the evidence as presented to the Tribunal. It would be sheer negation of justice to reopen the case as the Organization now asks.

10. Judgment 1376 said under 19:

> "Any organisation that is serious about deterring sexual harassment and consequential abuse of authority by a superior officer must be seen to take proper action. In particular victims of such behaviour must feel confident

> that it will take their allegations seriously and not let them be victimised on that account."

The WHO argues that the very purpose of setting up its panel was to give full effect to the judgment. It is beyond comprehension how the Organization could interpret that general observation, which holds good for all international organisations and refers to what they should do in the first instance, as justification for the WHO's opening investigation into matters which had already been adjudicated and offering the result in purported contradiction of the Tribunal's own findings. It thereby betrays utter ignorance of the *res judicata* rule.

11. The conclusion is that the Tribunal will not review Judgment 1376: it made its ruling on the evidence presented to it and there are no valid grounds for any review.

12. In her surrejoinder the complainant claims an award of moral damages for what she describes as the Organization's continuing persecution of her and for the damages to her good name due to rumours arising out of publicity given to the panel's report. She also claims costs.

13. It is not appropriate for her to make a counterclaim to damages in the context of her submissions on an application by the Organization for review of Judgment 1376. The claim arises out of a separate cause of action and is one that she should pursue separately. She is, however, entitled to an award of costs for answering the Organization's case, and the Tribunal set them at 3,000 Swiss francs.

DECISION:

For the above reasons,

1. The application is dismissed.
2. The Organization shall pay the complainant 3,000 Swiss francs in costs.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

Wm Douglas
William Douglas

Mella Carroll
Mella Carroll

Mark Fernando

AB Gardner
A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FIRST SESSION

In re SIMON (No. 2)
(Application for interpretation
and review)

Judgment 1505

THE ADMINISTRATIVE TRIBUNAL,

Considering the application filed by Mrs. Françoise Danielle Simon on 22 May 1995 for the interpretation and review of Judgment 1406, the reply of 25 August from the World Health Organization (WHO), the complainant's letter of 26 September informing the Registrar of the Tribunal that she did not wish to rejoin, the WHO's further brief of 13 November and the complainant's comments thereon of 4 December 1995;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

CONSIDERATIONS:

1. The World Health Organization declined to renew the complainant's appointment. In Judgment 1406 of 1 February 1995 the Tribunal awarded her damages in the amount of three months' pay reckoned on the basis of the emoluments she would have got from 1 October to 31 December 1993. That amount was stated to be "over and above the amounts already granted to her by the Director-General", namely what she would have earned from 1 July to 30 September 1993 and 1,000 United States dollars in moral damages. The Tribunal also awarded her "interest at the rate of 10 per cent a year from the date at which each monthly payment would have fallen due".

2. On 31 March 1995 the WHO accordingly paid her 70,190.97 Swiss francs. That total was made up of the sums originally offered by the Director-General in compensation, the further sum awarded by the Tribunal, plus interest, and the awards of moral damages and costs. On 8 September 1995 the Director of the Personnel Division informed her that he had ordered payment to her of 3,361.64 Swiss francs by way of

interest on the Director-General's grant of compensation as reckoned from 4 February 1994, the date of his decision, to 31 March 1995.

3. Being dissatisfied, on 22 May 1995 the complainant filed this application for the interpretation and, subsidiarily, review of Judgment 1406. Her application is about the reckoning of interest on the amount of compensation the Director-General had granted her before the judgment.

4. In her submission the judgment means that the interest is to be reckoned at 10 per cent a year as from each month on the full amount due, i.e. including the sum equivalent to what she would have earned from 1 July to 30 September 1993; failing that, the Tribunal must - she argues - have wrongly assumed that the WHO had already paid her the amount originally promised, and such mistake of fact warrants review. For the reasons set out below both her pleas fail.

5. Judgment 1406 leaves no room for doubt: the sum to bear interest at 10 per cent a year is the amount that the Tribunal awarded in damages, and no other. So the WHO executed the judgment correctly in paying 3,835.44 francs as interest on the sums she would have earned from 1 October to 31 December 1993.

6. The Tribunal did not err in not ordering the Organization to pay interest on sums it had agreed to pay by a decision which the judgment merely recorded. Besides, the WHO did pay her the interest customarily due from 4 February 1994, the date of that decision, until 31 March 1995, the date at which it paid the promised amount. Having ruled on grounds of equity, the Tribunal sees no grounds in any of the circumstances set out above for review of its judgment.

7. The complainant's claim to costs is therefore disallowed as well.

DECISION:

For the above reasons,

The application is dismissed.

In witness of this judgment Mr. Michel Gentot, Vice-President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

(Signed)

Michel Gentot Mella Carroll Egli

A.B. Gardner

EIGHTY-FIRST SESSION

In re DELOS Judgment 1506

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Milan Delos against the United Nations Industrial Development Organization (UNIDO) on 2 May 1995 and corrected on 2 June, UNIDO's reply of 7 September, the complainant's rejoinder of 5 October and the Organization's surrejoinder of 30 November 1995;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a citizen of the United States, was on UNIDO's staff from 1 January 1968 until 30 September 1992, when he retired. Under the rules of the United Nations Joint Staff Pension Fund, in which he was a participant, he chose to take part of his pension entitlements in a lump sum. It was UNIDO's policy at the time to reimburse the amounts any former officials owed to the inland revenue of the United States by way of income tax on such payments.

Under an agreement of 26 March 1993 between UNIDO and the Government of the United States lump sums the Fund paid as from 1 January 1992 were no longer treated as "institutional income" subject to tax refunds from the Organization.

By a letter of 27 July 1994 the complainant asked the Director-General to pay the tax to be levied on the lump sum he had been paid in 1993. In ensuing correspondence the Administration informed him of its efforts to reach a solution with the Government of the United States and the complainant expressed worry about mounting interest on the tax yet unpaid and about the penalty fees he was incurring for the delay in meeting his obligations.

By a memorandum dated 10 March 1995 he asked the Director-General for leave to put his case directly to the Tribunal. Having later learned from a letter that the Managing Director of the Division of Administration had written him on 8 March that the Organization wanted to "seek a solution" quickly, he asked the Director-General in a letter dated 2 April to review his case under Staff Rule 112.02(a).

By a letter of 3 April 1995 the Managing Director told him that the Organization was willing to refund the tax as soon as he gave the Administration "details". That is the decision he impugns.

B. The complainant submits that UNIDO has a duty to pay not only the amounts he owes as tax on the lump sum but also the accrued interest and the sums imposed by way of penalty. The delay was, he contends, of UNIDO's own making. He also alleges breach of equal treatment since the Organization has reimbursed other retired officials in like case.

He wants the Tribunal to set aside the impugned decision and order UNIDO to pay the tax on his lump-sum payment from the Pension Fund as well as interest, penalties and costs he has incurred.

C. In its reply UNIDO argues that his complaint is irreceivable because the challenged decision is not a final one and he failed to exhaust the internal remedies open to him by awaiting review of the decision he objects to. The "final administrative decision", UNIDO says, was in a letter it sent him on 3 May 1995 offering to settle the dispute amicably. In any event the Director-General did not grant him leave to go directly to the Tribunal.

UNIDO refutes his pleas on the merits and observes that it did its utmost to settle his case. He has only himself to blame for any interest and penalty fees he may owe the tax authorities: the Organization was not liable for his failure to file a tax return in time. Nor could it refund an amount of which he had given it no evidence of payment.

D. In his rejoinder the complainant disputes UNIDO's account of the facts and presses his pleas. He did not file a tax return for 1993 because he lacked the means to pay. Even if he had filed, the Organization had no right to information on his tax situation unless it was willing to settle his claim.

E. In its surrejoinder UNIDO maintains its earlier pleas on receivability and the merits.

CONSIDERATIONS:

1. The complainant retired from the staff of UNIDO on 30 September 1992, when he was at step 9 in grade D.1. He then opted for payment of one-third of his pension entitlements in the form of a lump sum from the United Nations Joint Staff Pension Fund, of which he was a participant, and he was paid the amount in March 1993. The Organization used to reimburse any income tax levied by the Government of his country, the United States, on such lump-sum payment.

2. On 26 March 1993 the Organization and that Government entered into an agreement under which lump-sum payments from the Fund would not as from 1 January 1992 qualify for reimbursement of tax from the Organization. Having been so informed by the Organization in March 1994, the complainant wrote on 27 July 1994 asking the Director-General to take a decision on his own case. He got an interim reply in a letter of 4 August 1994 from the Managing Director of UNIDO's Division of Administration. On 10 November 1994 the Managing Director wrote a letter to the Permanent Representative of the United States to UNIDO asking the Government to make an exception in favour of the complainant and of another citizen of the United States who was in a similar position. The Government refused the Managing Director's request by a letter of 28 February 1995 and the Managing Director so informed the complainant by a letter of 8 March 1995 which said that the Organization would "now endeavour to seek a solution as a matter of priority".

3. By a letter of 10 March 1995 the complainant asked the Director-General to waive the requirement of appeal to the Joint Appeals Board and let him put his case directly to the Tribunal. His request was never granted. On 2 April 1995 he wrote to the Director-General referring to the letter of 8 March 1995 and asking under Staff Rule 112.02(a) for review of the decision.

4. Rule 112.02(a) reads:

> "A serving or former staff member who wishes to appeal an administrative decision under the terms of regulation 12.1, shall, as a first step, address a letter to the Director-General, requesting that the administrative decision be reviewed. Such a letter must be sent within 60 days from the date the staff member received notification of the decision in writing."

The complainant's letter of 2 April met that deadline.

5. The Managing Director wrote to the complainant the very next day referring to the letter of 8 March 1995 and

saying that the Organization was prepared to pay him the amount of income tax levied by the United States on the lump-sum payment he had received from the Fund on retirement. But the complainant wrote to the Director-General on 8 April to say that he found UNIDO's offer unacceptable "as it makes no reference to payment of penalty, interest, legal and other costs which result from the late payment of tax". On 2 May 1995 he filed this complaint.

6. In a letter of 3 May the Managing Director acknowledged receipt of the complainant's letters. He said that the Organization wanted "an amicable settlement", asked the complainant to provide supporting documentary evidence and advised him to submit his tax return for 1993 to the United States Government. In answer to a further letter from the complainant dated 8 May the Managing Director wrote again on 23 May to confirm UNIDO's position as stated in his letter of 3 May, to which he said it had nothing to add.

7. The decision that the complainant is impugning is the one in UNIDO's letter of 3 April 1995, to pay only the tax levied on the lump-sum payment, not the expenses he had incurred such as penalties and costs. The Organization objects that the complaint is irreceivable on the grounds that the decision impugned is not a final one: the complainant has, it pleads, failed to exhaust the internal means of redress because he did not appeal to the Joint Appeals Board.

8. The plea is upheld. The complainant wrote on 2 April 1995 asking the Director-General to reconsider the decision in the letter of 8 March. The answer was in the Managing Director's letter of 3 May. Staff Rule 112.02(b)(i) required him to appeal to the Joint Appeals Board within sixty days of the date of receipt of the answer, since his request for waiver in his letter of 10 March was never granted. He did not file an appeal with the Board in accordance with that Rule.

9. The conclusion is that the complaint is irreceivable under Article VII(1) of the Tribunal's Statute because the complainant has failed to exhaust the internal means of redress.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

Wm Douglas Mella Carroll

William Douglas Mella Carroll Mark Fernando

A.B. Gardner

A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL

TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANISATION

ADMINISTRATIVE TRIBUNAL

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FIRST SESSION

In re MORIER (No. 2)
(Application for review)

Judgment 1507

THE ADMINISTRATIVE TRIBUNAL,

Considering the application filed by Mr. Roland Morier on 27 July 1995 for review of Judgment 1418;

Considering Articles II, paragraph 5, and VI of the Statute of the Tribunal and Article 7 of its Rules;

Having examined the written submissions;

CONSIDERATIONS:

1. The complainant, who was born in 1952, obtained an appointment with the Universal Postal Union (UPU) in September 1991 as a computer expert at grade G.6. He was to be on probation for two years. On 9 June 1993 the Deputy Director-General sent him notice of dismissal as from 7 July 1993 and summarily relieved him of duty. The complainant asked for reconsideration but the Director-General upheld the decision by a letter of 15 July. On appeal the Director-General confirmed his decision on 11 October 1993. By Judgment 1418 of 1 February 1995 the Tribunal dismissed Mr. Morier's complaint challenging that decision. In the present application he seeks review of that judgment and his reinstatement in the Union.

2. According to consistent precedent the Tribunal will allow an application for review only in exceptional cases. Its judgments are, as Article VI of its Statute says, "final and without appeal" and carry the authority of res judicata. Admissible grounds for review are strictly limited: failure to take account of a material fact, an error of fact which involves no exercise of judgment, failure to rule on a claim, and the discovery of a new fact which the complainant was unable to rely on in the original proceedings. Moreover, the plea must be such as to affect the original ruling: see

Judgment 1255 (in re Bansal and Harpalani Nos. 4) under 2. Inadmissible pleas for review are a mistake of law, failure to admit evidence, a wrong appraisal of the facts and failure to rule on pleas: see, for example, Judgment 442 (in re de Villegas No. 4), also under 2.

3. The gist of the complainant's challenge to the earlier judgment is implied: that it made a mistake of law due to misreading of the facts. His brief sets out in fine six objections to the judgment.

(1) It says wrongly that his work was undocumented, when there were many electronic data available.

(2) It says, again wrongly, that he did not see the Deputy Director-General.

(3) It is inconsistent in saying that his working after hours posed security problems, when he had been asked to do personal work for the Deputy Director-General.

(4) The Tribunal wrongly accepted another official's statements that the Director-General had been threatened.

(5) It accepted spiteful misstatements about him, such as the charge of sabotage of an obsolete network.

(6) The other official was, because of past behaviour, an unreliable witness.

He thereby pleads mistakes of law or in the appraisal of the evidence, which, as was said in 2 above, afford no grounds for review. Since the application is clearly irreceivable it is summarily dismissed under Article 7 of the Tribunal's Rules.

DECISION:

For the above reasons,

The application is dismissed.

In witness of this judgment Mr. Michel Gentot, Vice-President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

(Signed)

Michel Gentot Mella Carroll Egli

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

EIGHTY-FIRST SESSION

In re GLENN (No. 2) Judgment 1508

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Joseph Glenn against the European Patent Organisation (EPO) on 3 April 1995 and corrected on 7 June, the EPO's reply of 10 August, the complainant's rejoinder of 19 September and the Organisation's surrejoinder of 13 December 1995;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Judgment 1341, on Mr. Glenn's first complaint, explains under A how he came to resign from the European Patent Office, the secretariat of the EPO.

Having learned on 13 August 1993 that the Invalidity Committee had found him fit to go back to work on Monday 16 August, he drafted a letter of resignation, which he dated 16 August. The same day, he says, his own ear-nose-and-throat specialist informed him that, as the "independent" member of the Committee, he had assessed the complainant's invalidity at 40 per cent in a handwritten addendum to its report. By a letter of 17 August the Director of Personnel informed him that the President of the Office had accepted his resignation.

He lodged an internal appeal on 24 October 1993 against the letter from the Director of Personnel. In a report of 21 November 1994 the Internal Appeals Committee recommended rejecting his appeal. By a letter of 10 January 1995, which he impugns, the Director of Staff Policy told him that the President had endorsed that recommendation.

B. The complainant submits that his resignation is invalid because the Administration suppressed a material fact from the Invalidity Committee's report. Had he known at the time that one of the Committee's members assessed his invalidity at 40 per cent, he would, instead of resigning, have applied for "amended duties" under the Service Regulations. So the EPO was in breach of its duty to inform him in full of the Committee's "findings".

He seeks the cancellation of his resignation.

C. In its reply the EPO argues that his complaint is "inadmissible" insofar as it amounts to a challenge of Judgment 1341, in which the Tribunal upheld the Invalidity Committee's report as lawful: such challenge is neither in the proper form nor well-founded. How can the independent member's addendum have escaped the complainant's notice when he submitted his own translation of it as evidence in his first complaint? Had its import been unclear to him he had only himself to blame for not seeking more information before he resigned.

D. In his rejoinder the complainant presses his pleas. Since the impugned decision rests on the Committee's report, the absence of any reference to his partial invalidity in its conclusions constitutes a fatal flaw.

E. In its surrejoinder the EPO says it finds no new material argument in the rejoinder. It had no reason to mention the finding of 40 per cent invalidity to him because benefits under Article 84 of the Service Regulations are payable only when someone suffers from such permanent invalidity as to be unfit for duty.

CONSIDERATIONS:

1. The factual background to the case is fully set out in Judgment 1341, on the complainant's first case. He now seeks the cancellation of his resignation, which he tendered on 16 August 1993, on the grounds that he had been persuaded to offer it because of an irregular report, dated 13 August 1993, by the Invalidity Committee of the EPO. He contends:

> "The sole reason for the resignation was a letter from the EPO dated 13 August 1993 which ordered an immediate and unqualified return to work after a long period of illness and examination by an Invalidity Committee. The EPO's letter purported to give effect to the decision of the Invalidity Committee."

The complainant observes that the letter made no mention of a handwritten note by one member of the Committee, an ear-nose-and-throat specialist, who thereby assessed the degree of his invalidity at 40 per cent. He states that not until 18 or 19 August, just after his resignation, did he become aware of that assessment, and he argues that his resignation, having been induced by concealment of a material fact, is invalid.

2. The EPO's letter of 13 August 1993, which was from the Director of Personnel, opens with the words "In accordance with the enclosed decision the Invalidity Committee has decided ...". In his rejoinder the complainant admits that he had received by the date of his resignation a copy of the Invalidity Committee's report, on which the specialist had added the handwritten comment, including two abbreviations, and in his submission it was "unintelligible even to a German, except perhaps for a doctor". He further states in his rejoinder that he saw the specialist on 16 August, not on 18 or 19 August, and then obtained from him an explanation of the handwritten comment. So his plea that his resignation of 16 August was induced by the suppression of a material fact cannot be sustained.

3. As to his contention that the Invalidity Committee's report was irregular, the question was resolved in Judgment 1341 and may not be reopened.

4. The conclusion is that his claims fail in their entirety.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Julio Barberis, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

Wm Douglas
William Douglas

Mella Carroll
Mella Carroll

Julio Barberis

A.B. Gardner
A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

EIGHTY-FIRST SESSION

In re ZHU Judgment 1509

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Weiyi Zhu against the United Nations Industrial Development Organization (UNIDO) on 10 June 1995 and corrected on 8 July, UNIDO's reply of 13 October, the complainant's rejoinder of 6 December 1995 and the Organization's surrejoinder of 13 March 1996;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to grant the complainant's application for the hearing of witnesses;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Chinese citizen born in 1959, joined the staff of the United Nations (UN) in New York on 23 February 1990 on secondment from the Government of China. He was granted a fixed-term appointment for two years as an associate translator at grade P.2. He was assigned to the joint Languages and Documentation Service of the United Nations and UNIDO at Vienna, which came under the administration of UNIDO until 31 March 1995.

By a telex of 17 February 1992 an official in the Office of Human Resources Management (OHRM) of the secretariat of the United Nations told UNIDO that the complainant's appointment was being extended by one year, until 22 February 1993, and that he was no longer on secondment. On 20 February 1992 the complainant agreed to the extension by signing a letter of appointment which put him under the Staff Regulations and Rules of the United Nations.

By a memorandum which he addressed on 6 August 1992 to the Secretary-General of the United Nations and to the Director-General of UNIDO he tendered his resignation from the UN and UNIDO as at 24 August 1992. In a memorandum dated 7 August a personnel officer of UNIDO told him that the Administration had waived the requirement of one month's notice and accepted his resignation at the date he had proposed.

By a letter of 29 August 1993 the complainant appealed to the UNIDO Joint Appeals Board against what he identified in later correspondence as the Director-General's offer on 18 February 1992 of a one-year extension of appointment.

In its report of 30 March 1995 the Board recommended rejecting his appeal and in a memorandum of 25 April 1995 the Director-General informed its secretary that he endorsed the conclusions of the Board. The complainant got that decision on 4 May, and it is the one he is impugning.

B. The complainant submits that he resigned under duress. He alleges victimisation by his supervisor, flaws in the reporting procedure, misuse of authority, breach of *patere legem quam ipse fecisti*, neglect of essential facts, the drawing of mistaken conclusions from the evidence and undue delay in processing his appeal.

He objects not only to the one-year extension of appointment but also to UNIDO's withholding promotion to P.3 and refusing to reinstate or re-employ him.

He claims reinstatement or re-employment at grade P.3 under a fixed-term contract with the United Nations or UNIDO, and awards of 100,000 United States dollars in damages and of $110,000 in costs.

C. In its reply UNIDO contends that the Tribunal is not competent to hear the case. As the complainant was a staff member of the secretariat of the United Nations and the decision to extend his appointment by one year was taken by that Organization it is the Administrative Tribunal of the United Nations that has jurisdiction. The fact that the Joint Appeals Board thought itself competent, without saying why, does not afford access to this Tribunal. As for UNIDO's refusal to re-employ him, the Tribunal again lacks competence because he held no contract with the Organization at the material time.

In subsidiary argument on the merits UNIDO maintains that the one-year extension was lawful under the Staff Regulations and Rules of the United Nations. UNIDO put no pressure on him to resign and he adduces no proof of any. Having freely resigned, he has no right to reinstatement.

D. In his rejoinder the complainant seeks to refute the arguments in UNIDO's reply. He enlarges on his own pleas, presses his claims and applies for temporary employment in the Organization by way of provisional relief.

E. In its surrejoinder the Organization presses its objections to the Tribunal's jurisdiction. It observes that the complainant's application for temporary employment is just the same claim cast in the guise of provisional relief.

CONSIDERATIONS:

1. The complainant joined the staff of the United Nations (UN) in 1990. He was granted a fixed-term appointment for two years from 23 February 1990 as an associate translator into Chinese at grade P.2 and was assigned to the joint Languages and Documentation Service of the United Nations and the United Nations Industrial Development Organization at Vienna. UNIDO, which has its headquarters there, administered the Service.

2. In a report on his performance in 1990-91 his supervisors initially rated it partly satisfactory, but he raised objections, and after discussion they altered their rating in October 1991 to fully satisfactory. On 16 January 1992 the Personnel Administration Section of UNIDO recommended to the Office of Human Resources Management of the United Nations in New York that his appointment be extended by one year. The Office having given its approval on 17 February 1992, he had his appointment extended accordingly, still at P.2.

3. The complainant was given letters of appointment to the staff of the United Nations both for the original fixed term and for the extension. Each of the letters referred to an "appointment in the Secretariat of the United Nations ... subject to the provisions of the Staff Regulations and Staff Rules" and was signed by an official of UNIDO for the "Director of Personnel, on behalf of the Secretary-General" of the United Nations. Both letters provided for termination by the Secretary-General subject to notice and the grant of an indemnity. The complainant signed the standard printed forms, which were addressed to the "Director of Personnel, United Nations".

4. On 6 August 1992 the complainant wrote a memorandum which he addressed both to the Secretary-General of the UN and to the Director-General of UNIDO offering to resign "from UN and UNIDO" at 24 August. In a memorandum of 7 August a personnel officer of UNIDO accepted his offer, waiving the requirement of one month's notice of resignation, and told him that the Office of Human Resources Management would be informed. In a memorandum of 17 August to the Director-General and other

officials of UNIDO the complainant said that he had been "pushed to resignation" because seriously flawed management practices, discriminatory treatment, deliberately adverse and delayed performance appraisals and threats of dismissal by his supervisors had ruined his career prospects. He returned to New York and started a three-year course at the Law School of Columbia University.

5. In March 1993 he received his supervisors' report appraising his performance from February 1991 to August 1992, which they again rated fully satisfactory. On 27 May 1993 he wrote to UNIDO asking for reinstatement, explaining that he had reconsidered his position in the light of that appraisal and the circumstances of his resignation. UNIDO answered in a letter of 24 June that although it had carefully reviewed the matter "severe budgetary constraints facing UNIDO at present and in the foreseeable future" were preventing regular recruitment.

6. By a letter of 29 August 1993 the complainant appealed to the Joint Appeals Board of UNIDO seeking redress for the refusal of a two-year extension of appointment and of promotion to grade P.3, which he attributed to serious procedural irregularities and delays in the appraisal of his performance; for being coerced into resignation; and for the refusal of reinstatement.

7. While disputing those three claims on the merits, the Organization raised the preliminary objection that the Board lacked competence on the grounds that the complainant had at all times been on the staff of the United Nations. But in its report of 30 March 1995 the Board declared, without saying why, that it did have competence; it entertained the claims and recommended rejecting them.

8. In a memorandum of 25 April 1995 to the secretary of the Board the Director-General endorsed the Board's recommendation; he said nothing of its ruling on competence though he did express reservations about some of its other conclusions. That is the impugned decision.

9. Article II, paragraph 5, of the Tribunal's Statute provides:

> "The Tribunal shall also be competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations of any other intergovernmental international organization approved by the Governing Body which has addressed to the Director-General a declaration

> recognizing, in accordance with its Constitution or internal administrative rules, the jurisdiction of the Tribunal for this purpose, as well as its Rules of Procedure."

10. UNIDO pleads that the Tribunal lacks competence on the grounds that the complainant was never a member of its staff. He retorts that the Organization may not raise the issue because the Joint Appeals Board held that it did have competence and the Director-General endorsed its recommendation without expressing any reservations on that matter. He observes that UNIDO has recognised the Tribunal's jurisdiction and that its Staff Regulations were applied to him, particularly in regard to the appraisal of his performance. He concludes that the Tribunal is competent to hear his complaint because, in accordance with Article II(5), he is alleging non-observance of provisions of the Staff Regulations of UNIDO.

11. It was the United Nations that offered him both the appointments which he had while he was at Vienna, and it was to the United Nations that he addressed his acceptance of each offer, thereby concluding a contract of employment with the UN. Indeed that is why he addressed his letter of resignation to the Secretary-General of the UN. True, he addressed it to the Director-General of UNIDO as well, but that was merely in recognition of UNIDO's supervision of his work and did not mean that the UN had ceased to be his employer. In sum, he was an official, not of UNIDO, but of the UN.

12. Article II(5) empowers the Tribunal to hear a complaint which an official of an international organisation that has duly recognised its jurisdiction has filed and which alleges non-observance of either the terms of the official's appointment or the Staff Regulations. As the Tribunal said in Judgment 231 (in re Sletholt), those are "two conditions which in practice coincide". The reference to "Staff Regulations" means those of the organisation of which a complainant is or was an official and does not include the staff regulations of any other.

13. The fact that UNIDO was administering the Languages and Documentation Service made neither the complainant one of its officials nor the Organization a party to the contract of employment. According to his letters of appointment the complainant was subject to the Staff Regulations and Staff Rules of the United Nations, not of UNIDO. And even if in administering the Service UNIDO did apply its own Staff Regulations to the complainant he did not on that account become a member of its staff. So any complaint by him that UNIDO failed to apply, or misapplied, its Staff Regulations to him is not within the Tribunal's competence.

14. The Tribunal's competence is determined by the provisions of its Statute. Neither the ruling by the Joint Appeals Board on its own competence nor the Director-General's endorsement or acquiescence can give the Tribunal jurisdiction which its Statute does not.

15. Insofar as the complainant is objecting to the denial of a two-year extension and of promotion and to being coerced to resign, his claims require consideration of the terms of his appointment to the UN and of the UN Staff Regulations. Allowing them would mean directing the UN, not UNIDO, to grant him the extension and the promotion he wants and to ignore his resignation. The Tribunal lacks competence to entertain his claims and to give any such directions.

16. Lastly, he objects as to UNIDO's refusal of reinstatement. When he made his claim on that score he was neither a serving nor a former official of UNIDO, to which he was no more than an outside applicant for employment and whose decision was in fact a refusal to recruit him. That decision raises no question of non-observance of the terms of appointment of an official of UNIDO, or of its Staff Regulations. So again the Tribunal may not entertain the claim.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

Wm Douglas
William Douglas

Mella Carroll
Mella Carroll

Mark Fernando

A.B. Gardner
A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FIRST SESSION

In re ANTOINET (No. 2)
and CUENCA-PEREZ

Judgment 1510

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Gérard Antoinet and the complaint filed by Mr. Antonio Cuenca-Pérez against the European Organization for Nuclear Research (CERN) on 1 June 1993 and corrected on 31 March 1995, CERN's replies of 19 July, the complainants' rejoinders of 8 December 1995 and the Organization's surrejoinder of 20 March 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. On 1 August 1991 CERN brought in a new career plan. It is known as the Merit-Oriented Advancement Scheme (MOAS) and is described in Judgment 1412 (in re Audria) under A.

The complainants are both firemen and belong to CERN's Fire and Rescue Service. The Service also employs senior firemen and team leaders.

Members of the Service expressed discontent with the grading they were to have under the Scheme and on 13 November 1991 the Leader of the Personnel Division referred their objections to a body known as the Career Paths Advisory Commission. In its report of 21 January 1992 the Commission said that putting the firemen on career path II and the senior firemen on path III was a fair transfer from the old to the new system.

By standard letters of 14 February the Leader of the Personnel Division told the firemen that they would be on path II as from 1 March 1992. On 30 March they submitted a collective appeal to the Director-General asking that they be put on path III. By a letter of 30 April the Director-General told them he would refer their case to the Joint Advisory Appeals Board.

The Board reported to the Director-General on 22 December 1992: "considering the pressure of time", it saw nothing wrong with the career paths the firemen had been put on at 1 March 1992; but it felt that taking each case separately would have been better and so it suggested setting up a working group to look at the grading of the staff of the Fire and Rescue Service.

By standard letters of 3 March 1993, which they impugn, the Director-General told the complainants and the other firemen that he endorsed the Board's recommendations.

In a preliminary report dated 30 August 1993 the working group suggested several criteria for determining the career paths of members of the Service, and they included vocational skills and training.

The Technical Inspection and Safety Commission submitted a report on 24 January 1994 on how to apply the criteria. In its view the working group's proposals could not be made to work fairly and in any event they offended against Article R II 2.07 of the Staff Regulations, which says that "A change of career path shall occur when a member of the personnel permanently assumes duties which correspond to those defined for another career path".

Further standard letters went on 14 November 1994 from the Director-General to the complainants and other firemen: he had, he said, dissolved the working group and rejected its suggestions, and he confirmed that their career paths would be those notified in the letters of 14 February 1992.

By a letter of 29 March 1995 to the complainants' counsel CERN agreed to apply the ratio of the Tribunal's judgment to anyone else on its staff who had the same duties as the complainants.

B. The complainants contend that in putting them on path II the Director-General clearly misread the evidence because he disregarded their training and duties and their grade at recruitment. Under Annex R C 1 of the Staff Regulations path II ordinarily corresponds to "specialised manual, office or support service work": path III to "fully qualified craft or office work involving a variety of problems of execution; or responsibility for specialised work units". Like all firemen at CERN the complainants were given induction training in firefighting and first aid; and they all have three years' practical experience including at least two at CERN, and a licence to drive a heavy vehicle. So path III is the right one. Besides, CERN's consistent practice has been to recruit firemen at grade 4, and for that reason and because of the kind of work they do it cannot take them on at a lower grade.

The complainants plead breach of equal treatment. Although their duties are on a par with those of electricians and mechanics on path III, putting them on path II ranks them along with builders and unskilled workmen. Having been recruited at grade 4 on path II, they have their career prospects limited to two normal grades and one for merit whereas careers at CERN usually span three normal ones and a further merit grade.

They want the Tribunal to set aside the challenged decisions and award them moral damages and costs.

C. In its reply CERN denies misappraisal of the facts. The Director-General took account of the three criteria laid down in document CC/1858 - "present grade", "level of duties" and "potential" - before setting the complainants on path II. The classification of duties is at the Director-General's discretion and subject to only limited review by the Tribunal. So it would be an interference in CERN's autonomy to allow the plea of misappraisal. Under Staff Regulation R II 2.07 it is not the qualifications but the level of duties that is the main criterion of the career path. Inasmuch as firemen are answerable to a senior fireman or team leader and seldom undergo more than a year's training their duties come under specialised "support service work" and so merit path II. Since CERN requires that a fireman have three years' experience at recruitment the proper starting grade in path II is 4, not 3. But the Organization is also free to put an inexperienced fireman at grade 3 on path II on recruitment.

There was no breach of equal treatment. Differences in duties and training warrant keeping mechanics and electricians in one group and firemen along with builders and other sorts of workmen in another. It is mistaken to see it as discriminatory to have put the complainants at grade 4 on path II at recruitment, since they already had experience and so were not on a par with others in grade 3 on that path.

Lastly, their claims to moral damages are irreceivable because they offer no figures.

D. In their rejoinder the complainants restate their pleas. In their submission the Tribunal does have power to review the appraisal of their duties and may interfere if it is wrong.

The training required of firemen shows the level of their duties even if it is not the prime determinant of the career path. On the strength of precedent the Tribunal awards moral damages if the impugned decision is unlawful and, as here, has obviously caused serious injury.

E. CERN presses its case in its surrejoinder. Its appraisal of the complainants' duties complied with the material rules and followed due consultation. It never intended that the introduction of MOAS should in itself prompt advancement or promotion. Had the Director-General put firemen on path III they would have gone straight to grade 6. So path II was plainly the right one. What they are really challenging is not the lawfulness of the individual decisions but the whole system of classifying jobs in the Fire and Rescue Service. So their case is an abuse of process.

CONSIDERATIONS:

1. The complainants are firemen in CERN's Fire and Rescue Service. Its Council brought in as from 1 August 1991 a "Merit-Oriented Advancement Scheme" which is described in, for example, Judgments 1354 (in re Guyen) and 1412 (in re Audria). CERN accordingly put them on one of the career paths the Scheme provides for, and they are objecting to the one it chose.

2. The case affects not just the complainants but all the firemen whom the Organization employs. By a decision of 14 February 1992 it put them all on path II as from 1 March. They lodged a "collective" appeal which went to the Joint Advisory Appeals Board. The Board's report was not categorical: it held that "considering the pressure of time" there was nothing wrong with the path chosen, but that the diversity of the firemen's technical qualifications precluded taking them all together; better to assess them singly. It recommended that a working group look into the grading of the staff of the Fire and Rescue Service. The Director-General agreed: by a decision of 3 March 1993 he rejected the firemen's appeal, confirmed their assignment to path II and set up an internal working group to look into the qualifications and records of each member of the Service. In its report to the Director-General the working group proposed new criteria for grading the firemen which would allow those with the right qualifications to go on path III. The officers in charge of Technical Inspection and Safety felt, however, that the criteria might prove unfair, or at least strike the firemen as such, and make for ill feeling between them. The upshot was that the Director-General rejected the criteria, disbanded the

working group and told the firemen by letter of 14 November 1994 that their path would still be II, though it might change at the scheduled yearly reviews.

3. Both complainants are impugning the Director-General's decision of 3 March 1993 rejecting their and the other firemen's appeal against assignment to path II. The Director of Administration told their counsel by a letter of 29 March 1995 that CERN would not mind if only two of them went to the Tribunal provided those two "argued the common case"; it would apply to anyone else with the same duties the ratio of the Tribunal's ruling on choice of career path. Notwithstanding such "agreement" - which does not bind the Tribunal anyway - CERN protests in its surrejoinder at the complainants' challenging, not the lawfulness of individual decisions, but the whole system of grading employees of the Fire and Rescue Service. CERN sees that as an abuse of process.

4. It is wrong. An international civil servant may not ordinarily impugn a general rule that does not affect himself. Yet he may challenge any individual decision that does him injury; in so doing he may support his claims with any plea he likes; and he may thus plead breach of some general principle or of a written rule or clause of his contract that constitutes a term of appointment. The complainants' intent is plain: they are challenging the decisions to put them on path II. And, however their case may, in CERN's view, affect the other firemen, they are just as free to plead flaws in the material rules as any mistakes of law or fact in assessing the peculiarities of their own position.

5. They have two pleas. One is that the Director-General plainly misread the evidence by overlooking the firemen's training, duties and grade in putting them on path II. Their other plea is the breach of equal treatment in likening their duties to "specialised manual, office or support service work".

6. Relevant to their first plea is the following excerpt from Judgment 1354 under 5:

> "Professional abilities are to be recognised in the Director-General's exercise of his discretion to determine the right career path and that decision is subject only to limited review by the Tribunal".

Did the Director-General observe the criteria he himself had set or make an obviously wrong assessment of the complainants' qualifications and abilities?

7. They submit that their training and duties and the usual starting grade of firemen - grade 4 - entitle them to

path III - "fully qualified craft or office work involving a variety of problems of execution" - not II, which corresponds to "specialised manual, office or support service work".

8. Two preliminary points are worth making. One is that the definitions of career paths in Annex R C 1 to Staff Regulation R II 2.01 are quite unsuited for particular duties such as a fireman's: since the categories are drawn too broadly approximation is needed to fit some employees in. The other point is that the whole system presumably called for review of each employee's position. According to its own new rules CERN had to take account of "present grade, level of duties and potential", and on the last of these opinion was bound to vary, at least in some instances. In the present cases there seems to have been no such individual review, though the outcome might have been to put some on path II and some on path III. CERN was understandably anxious that the initial determination of career paths should make as far as possible for equal treatment of everyone in the same grade. It was wary of suddenly upsetting the balanced ranking it had achieved in units like the complainants'. But the Tribunal is still free to review the individual decisions impugned and see whether in each particular case CERN abided by its own rules.

9. The complainants used to be in grade 5. After CERN had put them on path II they were still in the same grade. According to the rules someone in grade 5 is entitled either to path II or conditionally to path III. CERN put them on II because their duties were more closely akin to specialised "support service work" than to "fully qualified ... work involving a variety of problems of execution". There is no denying that firemen may sometimes run into difficulty in performing some of their duties. Yet there is no obvious misappraisal of the evidence in the choice of their career path. On the contrary it is warranted because the firemen are subject to a strict chain of command and subordinate to senior firemen, who in turn take orders from team leaders. Firemen do have to have solid training, though the period is not always the same; and the grade they are recruited at is not 3 - the starting grade for path II - but 4. But neither of those facts bears out the complainants' charge of clearly mistaken determination of their career path. And since they are not saying that that determination overlooked their potential their plea cannot be sustained.

10. Nor is there any evidence of breach of equal treatment. The complainants plead: first, that firemen have been put on the same path as employees such as builders and unskilled workmen who have less varied and demanding duties than they; secondly, that they do work that is no less demanding than that of mechanics and electricians, who are on path III; and thirdly, that a fireman's career is confined to two ordinary grades and a third for merit, whereas other

employees on paths II to V get access to three ordinary grades and a fourth for merit.

11. The last point can be disposed of first. As CERN observes, its practice of giving firemen grade 4 on recruitment on the grounds of prior experience does not amount to any discriminatory narrowing of career prospects. Since there is nothing to prevent CERN's recruiting them at grade 3, the starting grade of path II, they fare better by present practice.

12. The comparisons they draw with mechanics and electricians on path III and builders and unskilled workmen on path II show just how hard it is to fit employees into broad categories that perforce comprise disparate duties. An electrician or mechanic at CERN is bound to be in charge of the installation and maintenance of complex equipment and needs a higher level of technical qualifications and skills than does a fireman.

13. Conversely, though builders and unskilled workmen probably need less training and have less responsibility than firemen, putting employees on the same path does not mean that their duties are similar. In any event, whether it is right to have builders and workmen on path II is not a material issue, and putting the complainants on the same path cannot be deemed discriminatory.

14. For want of evidence of failure to treat alike people who are in like case, the complainants' claims to the quashing of the impugned decisions fail, and so therefore do their claims to moral damages and costs.

DECISION:

For the above reasons,

The complaints are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

(Signed)

William Douglas Michel Gentot Egli

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FIRST SESSION

In re BAUDET and DECRESSAC

Judgment 1511

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr. Serge Baudet and Mr. Alain Decressac against the European Organization for Nuclear Research (CERN) on 1 June 1993 and corrected on 31 March 1995, CERN's replies of 19 July, the complainants' rejoinders of 8 December 1995 and the Organization's surrejoinders of 20 March 1996.

Considering Article II, paragraph 5, of the Statute of the Tribunal:

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to this case are set out under A in Judgment 1510 (in re Antoinet No. 2 and Cuenca-Pérez) also delivered this day.

The complainants are both senior firemen in CERN's Fire and Rescue Service.

By standard letters of 3 March 1993, which they impugn, the Director-General confirmed that he was putting them on career path III under the Organization's new career plan, known as the Merit-Oriented Advancement Scheme (MOAS).

B. The complainants rely on the same arguments summed up in the above-mentioned judgment, under B, which support the contention that firemen at CERN should be on path III. They say that because they are higher in rank they should be on path IV and that the decisions putting them on path III are unlawful.

They seek the quashing of the impugned decisions and awards of moral damages and costs.

C. In reply CERN relies on the reasoning summed up in the above-mentioned judgment under C. Since path II was the proper one for firemen, the complainants' rank, though higher, does not warrant putting them on path IV.

D. In rejoinder the complainants restate their pleas and make the same comments on moral injury as appear in the other judgment under D.

E. CERN presses its pleas in its surrejoinder.

CONSIDERATIONS:

1. The complainants are senior firemen in CERN's Fire and Rescue Service. They object to a decision to put them on career path III, their pleas being the same mutatis mutandis as those Mr. Antoinet and Mr. Cuenca-Pérez put forward in the case that forms the subject of Judgment 1510. They argue that since firemen should be on path III they, who rank higher, should be on path IV.

2. They claim the quashing of the impugned decision merely on the grounds that it is wrong to put the firemen on path II: they allege no other flaws in putting them on path III. Since the firemen fail for the reasons set out in Judgment 1510, the senior firemen too must lose their case.

DECISION:

For the above reasons,

The complaints are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

(Signed)

William Douglas Michel Gentot Egli

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FIRST SESSION

In re BOUVRY (No. 2) Judgment 1512

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Gilbert Bouvry against the European Organization for Nuclear Research (CERN) on 1 June 1993 and corrected on 31 March 1995, CERN's reply of 19 July 1995, the complainant's rejoinder of 8 December 1995 and the Organization's surrejoinder of 20 March 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to this case appear under A in Judgments 1510 (in re Antoinet No. 2 and Cuenca-Pérez) and 1511 (in re Baudet and Decressac) also delivered this day.

The complainant is a team leader in CERN's Fire and Rescue Service.

By a letter of 3 March 1993, the impugned decision, the Director-General confirmed that he was put on career path IV under the Merit-Oriented Advancement Scheme (MOAS).

B. The complainant relies on the pleas, set out in the above-mentioned judgments under B, which support the contentions that firemen should be on path III and senior firemen on path IV. He says that because he is higher in rank than they he should be on path V and that putting him on path IV is unlawful.

He seeks the quashing of the impugned decision and awards of moral damages and costs.

C. In reply CERN relies on the pleas it put forward in the above-mentioned cases. It submits that since it was right to put the firemen on path II and the senior firemen on path III, the complainant, though higher in rank, should not be put on path V.

D. In his rejoinder the complainant restates his arguments and repeats the observations on moral injury made by the firemen and senior firemen.

E. In its surrejoinder CERN presses its pleas.

CONSIDERATIONS:

1. The complainant is a team leader in CERN's Fire and Rescue Service and is challenging the Director-General's decision of 3 March 1993 to put him on career path IV. He simply repeats the arguments put forward in support of the complaints of Mr. Antoinet and Mr. Cuenca-Pérez, who are firemen, and of Mr. Baudet and Mr. Decressac, who are senior firemen. He argues that, being higher in rank, he should be on career path V, since firemen should be on path III and senior firemen should be on path IV. Judgments 1510 and 1511, delivered this day, rule on those complaints.

2. He claims the quashing of the impugned decision on those grounds alone and offers no pleas in support of the view that his own path is wrong. Since the other complaints fail for the reasons stated in Judgments 1510 and 1511 this complainant too must lose his case.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

(Signed)

William Douglas Michel Gentot Egli

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

EIGHTY-FIRST SESSION

In re FAUQUEX Judgment 1513

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Miss Arlette Marie-Louise Fauquex against the World Health Organization (WHO) on 4 July 1995, the WHO's reply of 6 October, the complainant's rejoinder of 6 December 1995 and the Organization's surrejoinder of 6 March 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Swiss citizen born in 1941, joined the staff of the WHO in 1971 under a fixed-term appointment as a technical officer at grade P.2, first in Zambia, then in Malawi. She got promotion to P.3 in 1975 and served in Togo, Nepal and the Western Pacific. In 1988 the WHO promoted her to P.4 at headquarters in Geneva, where she was put on a post under the Global Programme on AIDS. She was granted a permanent appointment in 1990.

The Organization decided to abolish her post for budgetary reasons at 31 December 1993. In a letter of 3 December 1993 the Director of the Division of Personnel made her an offer of "separation by mutual agreement" under WHO Staff Rule 1015. After negotiation in ensuing correspondence she endorsed terms of separation in a letter of 2 February 1994. They included (1) leave without pay from 1 February 1994 until 30 November 1996, when she is to qualify for early retirement; (2) payment by the WHO until then of her contributions and its own to the pension and staff health insurance funds; (3) three months' pay and a termination entitlement; and (4) a promise by the Organization to give her until 30 November 1996 "priority consideration for any short-term employment but also for positions in the [Professional] and [General Service] categories for which [she has] the necessary qualifications, i.e. educational background and experience".

On 23 March 1994 she applied for a P.4 post as supply officer which the Organization had put up for competition on

25 February 1994. But on 16 August 1994 a senior personnel officer told her orally that the Director-General had appointed someone else.

By a letter of 25 August 1994 she asked the Director of Personnel to review that decision under Staff Rule 1230.8.1 on the grounds that the result of the competition and the Organization's failure to consider her for several short-term appointments were at odds with the terms of separation she had agreed to.

In a letter dated 9 September the Director replied that her unwillingness to accept long-term employment outside Geneva made a "suitable" vacancy hard to find.

On 4 November 1994 she appealed to the headquarters Board of Appeal. In its report of 9 March 1995 the Board recommended rejecting her appeal but paying her costs up to the amount of 1,500 Swiss francs and agreeing to "honour its commitment" to seek positions for which she might be "considered and given priority".

By a letter of 18 May 1995, which she impugns, the Director-General endorsed the Board's recommendations save as to costs.

B. The complainant submits that the WHO has failed to keep its promise of 21 January 1994 to give her priority for any position in the Professional or General Service category that matches her qualifications. She sees evidence of that failure in its appointing someone else as supply officer and granting "a whole series" of short-term contracts to others without even considering whether they might suit her.

The appointment of the supply officer shows procedural and substantive flaws. In breach of Manual paragraph II.3.340 no representative of the Staff Committee took part in the meeting of the Senior Staff Selection Committee. Although the complainant was one of four on the shortlist of candidates "most suitable for the post" under Manual paragraph II.3.420 the acting Director of Personnel told her in a letter of 11 November 1994 that she was not fit to carry out the material duties "in an able manner".

The WHO recruited 26 technical officers at P.3 or P.4 between 1 December 1993 and June 1995, and its failure to give her the "slightest" consideration for any of those positions amounts to breach of its promise of priority.

She asks the Tribunal to order the disclosure to it and to her of the report and other documents about the meeting of the Senior Staff Selection Committee. She seeks compensation for loss of earnings in the amount of three years' pay at her last grade and step; extension of her appointment from 1 December 1996 until she reaches the age of 60 on leave without pay but with "continued payment by WHO and by herself of their respective contributions to the United Nations Joint Staff Pension Fund and to the WHO Staff Health Insurance"; and 5,000 Swiss francs in costs.

C. In its reply the Organization contends that it has kept its promise to her. Putting her name on a shortlist did not entitle her to a post she did not qualify for. There was no procedural defect in the Selection Committee's recommendation and no lack of diligence by the Administration, which asked units to give her "sympathetic consideration" when recruiting consultants.

D. In her rejoinder the complainant challenges the WHO's interpretation of its promise and enlarges on her pleas.

E. In its surrejoinder the WHO seeks to refute her arguments in the rejoinder and presses its submissions in reply.

CONSIDERATIONS:

1. The WHO appointed the complainant to its staff in December 1971. From 1988 to 1994 it employed her at headquarters in Geneva under its Global Programme on AIDS. Before it abolished her post on 31 December 1993 she often saw administrative staff of the Programme to discuss an alternative assignment. Though she was unwilling to be away from Geneva for longer than three months, she had a better chance of transfer to the field since suitable posts were more likely to be available there. Though she was entitled to participate in the prescribed procedure for reduction in force (RIF), she decided not to. Instead she and the Organization concluded an agreement to take effect at 1 February 1994, whereby, instead of having her appointment terminated, she was put on leave without pay until 30 November 1996, when she would reach the age of early retirement and qualify for a pension. The agreement also gave her various benefits, one being that while on leave without pay she was to be given "priority consideration for any short-term employment but also for positions in the [Professional] and [General Service] categories for which she had the necessary qualifications, i.e. education background and experience".

2. On 23 March 1994 she applied for a vacant post for a supply officer. Though she was short-listed and called for

interviews, another candidate was chosen. Having heard informally from a senior personnel officer on 16 August that she had not been successful she applied in a letter of 25 August to the Director of Personnel for reconsideration in accordance with Staff Rule 1230.8.1. Confirmation of the previous decision was notified to her by a letter of 9 September 1994. She then appealed on 4 November 1994 to the headquarters Board of Appeal against the Organization's breach of its promise to give her priority for any suitable position and in particular against the appointment of someone else as supply officer.

3. The Board reported on 9 March 1995. It found no breach of the agreement in appointing someone else as supply officer and no evidence to establish that she had been bypassed in recruitment for consultant posts. But it thought that the "current procedures for implementing commitments to give priority to separating staff were not sufficiently rigorous to ensure that the commitments were honoured" and so there was "a need to review these procedures". The Board recommended dismissing the complainant's appeal against non-selection for the post and awarding her no compensation but paying her costs up to 1,500 Swiss francs. It also recommended that "to honour its commitment, the Administration be proactive and take steps to identify suitable positions for which the Appellant [could] be considered and given priority". The Director-General endorsed all the recommendations but the one about costs and so informed the complainant by a letter of 18 May 1995. That is the decision she is impugning.

Discovery

4. The complainant seeks disclosure of:

(a) the Senior Staff Selection Committee's report on its deliberations about the filling of the post of supply officer;

(b) "copies of all documents placed before that Committee, when it deliberated on the filling of the said post, with respect to the complainant"; and

(c) "copies of the information provided to the Board of Appeal to explain the absence of a representative of the Staff Committee from the meeting of the Senior Staff Selection Committee and copies of all notifications covering the meeting sent to those representatives".

5. At the request of the Board the WHO submitted to it a copy of the Selection Committee's report but is unwilling to disclose documents to the complainant on the grounds that the

Committee's records are privileged. The complainant contests the WHO's position. The Organization relies on Judgment 1372 (in re Malhotra). In that case the regional Board of Appeal had sought documents from the Selection Committee and been refused them on the grounds of privilege. The Tribunal ordered disclosure on the grounds that an item that formed part of the proceedings that had led to the impugned decision might not be withheld from scrutiny by the Tribunal and that rule held good for any appellate body. The complainant in that case had not sought disclosure to himself.

6. As a general rule a complainant may not be entitled to consult any records that may have been made of discussions by a selection committee: members of such committees would not feel free to discuss candidates independently in future if they felt at risk of having their own views divulged: see Judgment 556 (in re Ali Khan).

7. The Tribunal has ordered the WHO to submit to it the documents mentioned in 4(a) and (b) above and the Organization has produced them. The Tribunal is satisfied that the plea of privilege can be sustained. The documents which were before the Selection Committee and which referred to the complainant consisted of documents she had herself submitted. There were also reports on the interviews with her on 21 April 1994, and they are privileged for the reason set out in 6 above. The privilege that protects the Committee's actual deliberations must cover also interviews held in preparation for its meeting. The complainant's application for disclosure to her of the documents listed under 4(a) and (b) above is therefore refused. As for the documents under 4(c), the matter is dealt with below, in 15 to 17.

The merits

8. The complainant claims:

(1) compensation for loss of earnings equivalent to three year's pay at her last grade and step;

(2) the extension of her contract, from 1 December 1996 up to the date at which she reaches the age of sixty, on leave without pay but with continued contributions by herself and the Organization to the United Nations Joint Staff Pension Fund and to the Staff Health Insurance Fund;

(3) 5,000 Swiss francs in costs.

9. There are two aspects to the complainant's case that the WHO's treatment of her was wrongful: one, its failure to appoint her to the post of supply officer, and the other its

granting consultancies and short-term contracts to others in breach of its commitment to her.

The post of supply officer

10. As to her unsuccessful application for the post of supply officer she has three objections. First, if she had not been thought fully qualified for the post and able to perform the duties and functions, she should not have been short-listed. Putting her on the list of four meant that she was suitable. And the Director of the Division of Personnel told her at an interview in April 1994 that he would support her. Her second argument is that the Organization broke its promise by appointing an outside candidate and so disregarding the principle laid down in Judgment 1323 (in re Morris). That case was about the appointment of such a candidate in preference to a staff member whose appointment had been terminated and who was entitled to the application of the reduction-in-force procedure. The Tribunal held that the WHO's Manual provided for preference over any outside candidate, not just over less well or equally qualified ones. Thirdly, she alleges a procedural flaw.

11. The Organization's answer to her first argument is that the reasons why she was put on the short list were that she had a long record of service and was out of a job; she had a permanent appointment; the Personnel Division asked that she be given priority; and her application suggested that she had some of the qualities needed. Though her application did not reveal breadth and depth of relevant experience, the Division which had the vacant post put her on the list to ensure thorough examination of her candidature and to see in interview whether she had experience that her application had not revealed. But the interview showed her relevant experience to be far too narrow for her to be able to work independently as a head of unit at grade P.4. She lacked thorough knowledge of supplies and equipment and experience of procurement. She had no experience of carrying out market surveys, analysing market conditions or negotiating procurement contracts. She could not have given professional guidance to her subordinates but would have had to go to them for guidance. For those reasons the Committee was unanimous that she could not be offered the post.

12. The Tribunal is satisfied that on that score the Organization was not at fault: it made no sort of commitment to the complainant by short-listing her and calling her for interview.

13. The Organization's answer to her second argument - about the appointment of an outside candidate to the post - is that she was not entitled to be considered for reassignment as if she had participated in the procedure for reduction in

force. She negotiated separation and the parties' rights and obligations are set out in the agreement she signed. She agreed thereby to separation instead of going through the reduction-in-force exercise. She did ask in her letter of 12 January 1994 to have one clause - about priority for short assignments - brought into line with the broader wording of paragraph II.9.370, which relates to that procedure; but the Director of Personnel refused and his reply of 21 January cannot be construed as consent: the agreement was as set out in that reply.

14. The Organization's plea succeeds. It made no offer to bring the clause of the agreement into line with 370. The separation by mutual consent was seen as an alternative to the reduction-in-force procedure and there are no grounds for construing the clause as if it prescribed such procedure. Judgment 1323 is irrelevant: it was about a reduction in force in which a dental officer applied for another position for a dental officer at the same grade. In this case the complainant was a laboratory technician and applied for the post of supply officer, for which she was not qualified, and the reduction-in-force procedure was not being followed.

15. Thirdly, the complainant alleges breach of due process, and she cites the report of the headquarters Board of Appeal, which said on that score:

> "The Board noted that there was no representative of the Staff Association at the Selection Committee meeting, but later learned that representatives of the Staff Association had been invited to the meeting but were unable to attend. The Board considered that the correct procedures had been followed."

The complainant contends that she "has so far had no opportunity to verify the circumstances in which the decision was taken in the absence of a staff representative" and wants "to reserve the possibility of reverting to that issue". That indeed is why she has sought disclosure of the documents mentioned in 4(c) above.

16. In its reply the Organization cites a memorandum issued by the Director of Personnel on 25 October 1990 about staff representation on the Senior Staff Selection Committee. According to that memorandum "Meetings of the [Committee] are not postponed if no staff representative is available to attend a particular meeting". The Organization said that both the staff representative on the Committee and one of the alternates were invited but neither was able to attend. The second alternate did attend the meeting as the staff representative for all the cases presented to the Committee, but because he was the second-level supervisor for the post of supply officer

he was unable to sign the Committee's recommendation. In her rejoinder the complainant says that she has spoken to the first of the alternates and he does not remember being invited to any meeting at the material time. In its surrejoinder the Organization further explains that the staff representative was then on holiday and it produces a memorandum by the first alternate saying that so long afterwards he cannot tell from his records whether or not he was invited. The Organization says that its practice is to telephone anyone invited to attend; someone who then says he cannot will get no written invitation.

17. In the light of the rules about the composition of the Committee and the Organization's explanations the Tribunal is satisfied that there was no procedural defect in it at the meeting, and the complainant's application for discovery is not warranted.

Short-term assignments

18. In support of her objections to the grant of consultancies and short-term contracts to others, she refers to the negotiation about separation, in particular a letter which she wrote on 12 January 1994 to the Director of Personnel and in which she said:

> "In point 5 of your offer, it is stated that I would be given priority consideration for any short-term employment in my field of specialisation in GPA or in any other service for which there may be a need during my leave without pay. The limitations resulting from the references to only short-term employment and to my field of specialisation do not appear consistent with paragraph 370 of the section of the WHO Manual relating to separation from service, according to which I should be given preference for any vacancy for which I am qualified. I would therefore request that point 5 be brought into line with that broader wording of the said paragraph 370."

The Director answered her in a letter of 21 January:

> "I agree that during the period of your leave-without-pay in lieu of termination you should not only be given priority consideration for any short-term employment but also for positions in the P and GS categories for which you have the necessary qualifications, i.e. educational background and experience."

She contends that the Organization's misinterpretation of the commitment it made amounts to an error of law. She says that at the end of 1993 she repeatedly asked the Chief of Administration, Management and Information of the GPA what short-term assignments there might be but he never told her. She later learned that the GPA had engaged a consultant to carry out, among others, functions which she herself had been performing, and that consultants were engaged in other units such as the Health Laboratory Technology and Blood Safety Units and the Division of Emergency and Humanitarian Action. She invited the Board of Appeal to order the Organization to explain, and the Organization supplied a list of those it had employed on short assignments at grades P.1 to P.4 since 1 December 1993. The complainant submits:

(a) Apart from mentioning the promise of priority given to her in a memorandum of 25 May 1995 to programmes at headquarters, the Division of Personnel did nothing to honour the commitment when Professional category staff were engaged on short assignments.

(b) She did not get, until the Board of Appeal asked for it, the information she had sought about short-term assignments in the GPA.

(c) The promise of priority was overlooked in remarks by the acting Chief of the Blood Safety Unit that a consultant employed on a laboratory post under the Programme on Health Technology would perform more competently than the complainant.

(d) The information given to the Board about short-term contracts and consultancies was so meagre as to allow no "precise determination of the functions and qualifications".

(e) In the list of short-term appointments in the Professional category appointments there were 26 technical officers at grade P.3 or P.4. Since she herself had held several posts as technical officer it would be surprising if she were not qualified for any of those 26 appointments.

(f) The same remark holds good as to the possibility of employing her as a consultant.

(g) Since announcements are not issued for short-term staff and consultants she had no means of finding out about the openings.

Though she is not saying that she was wilfully bypassed or that there was a deliberate intention not to honour the commitment, she believes that the failure to "maintain sufficiently rigorous procedures to ensure that commitments are honoured necessarily leads to disregard of those commitments", and did in her own case.

19. The Organization in reply gives a long and detailed account of the efforts it made to find assignments to meet its

commitment towards the complainant. It gave her three assignments: one from 6 to 8 April 1994; a second from 15 to 19 June 1994; and a third from 15 November 1994 to 15 February 1995. It explains that it does not choose short-term in the same way as fixed-term staff, whose appointments must go through procedures for recruitment and selection co-ordinated by the Division of Personnel at headquarters, whereas short-term staff and consultants are directly selected by the unit that needs them. It says that it repeatedly informed divisions at headquarters and regional offices of its commitment. At the outset it sent her curriculum vitae to programmes at headquarters and regional offices with a memorandum saying she was available for both short and long-term assignments. On 25 May 1994 it sent out another memorandum emphasising that she should be given priority for any short or long-term assignment for which she had the right qualifications and experience. On 5 September 1995 it sent a third memorandum to Assistant Directors-General and divisions at headquarters. The Division of Personnel made particular efforts to contact by telephone and in writing the divisions and units most likely to employ her. It even approached outside organisations (the United Nations Programme on AIDS, the United Nations High Commissioner's Office for Refugees and the United Nations Centre for Human Rights). The Chief of Personnel Planning and Recruitment saw her on average once a month from April 1994. As to the particular consultancy she says was granted under the GPA after her departure, the Organization says that the duties of the post she used to hold were quite different from the consultant's terms of reference. As for her objections to remarks made by the acting Chief of the Blood Safety Unit, it points out that what he said was that she had not the experience to carry out the duties being performed and did not qualify for the position.

20. The complainant's plea fails. Again, the above account of what the Organization has done satisfied the Tribunal of its constant efforts to find her a position suited to her background and experience. It may not be held liable for any breach of its general commitment to her.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Julio Barberis, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

Wm Douglas
William Douglas

Mella Carroll
Mella Carroll

Julio Barberis

A.B. Gardner
A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FIRST SESSION

In re AYMON (No. 2), BALL (No. 3)
and BORGHINI (No. 3)
(Application for execution)

Judgment 1514

THE ADMINISTRATIVE TRIBUNAL,

Considering the common application filed by Mr. Marcel Aymon, Mr. Derek Ball and Mr. Michel Borghini on 13 June 1995 for the execution of Judgment 1368, the reply of 5 October from the European Organization for Nuclear Research (CERN), the complainants' rejoinder of 11 December 1995 and CERN's surrejoinder of 12 March 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

CONSIDERATIONS:

1. In Judgment 1368 (in re Aymon, Ball No. 2 and Borghini No. 2) of 13 July 1994 the Tribunal allowed earlier complaints by the present complainants, who are all officials at CERN, challenging their pay slips for January 1993. The Tribunal held that CERN had failed to set scales of staff pay by a decision of the Organization's Council, as Staff Rule IV 1.01 required. It sent the case back "for the setting of the complainants' pay ... on the strength of lawfully determined scales".

2. The complainants are applying for execution of the judgment on the grounds that the decision that the Council took on 16 December 1994 to raise staff pay for 1993 by 2.46 per cent failed to comply with the Tribunal's order.

3. CERN replies that their complaint is no application for execution and that they were not free to appeal directly to the Tribunal against decisions on pay before they had exhausted their internal remedies. What they are impugning, in CERN's

submission, is new decisions and some of the procedural and substantive flaws they plead are irrelevant to the execution of Judgment 1368.

4. That objection to receivability fails. Judgment 1368 required CERN to set the complainants' pay "on the strength of lawfully determined scales". So what it had to do was not just take new decisions untainted with the flaw the Tribunal had found but apply all the other material, procedural and substantive rules, which, having set aside the impugned decisions on the grounds of that flaw alone, the Tribunal had had no need to comment on. So any objections to the lawfulness of the decisions taken in compliance with the duty to set pay as ordered have a bearing on the execution of the judgment. And, as is plain from the case law - see, for example Judgments 732 (in re Loroch No. 3) and 1328 (in re Bluske No. 3) - the complainants did not have to go through the internal appeal procedure before coming back to the Tribunal.

5. CERN raises the further objection that the complaint is time-barred for having been lodged over ninety days after notification to the complainants, on 25 January 1995, of the challenged decisions in their pay slips for that month. But those pay slips said nothing of the corrections which CERN had made in the figures of their pay for 1993 in pursuance with the Council's decision to endorse the proposal of a 2.46 per cent rise in pay. The complainants had no reason to infer from the omission that the time limit would start at the date at which they received the pay slips. On 25 January 1995 they asked the Director-General to give them notice of the effects that the Council's decision of 16 December 1994 might have on their pay. At the end of a letter of reply dated 15 March 1995 he said:

> "In execution of the Tribunal's judgment cited above I wish to inform you that your basic salary will be subject to a rise of 2.46 per cent as from 1 January 1993."

That is the decision that the complainants are impugning in this complaint, which they lodged on 13 June 1995 and which is fully receivable.

6. They have two main arguments on the merits. One is that on 16 December 1994 the Council merely endorsed, without inquiry, the decisions that the Director-General had taken earlier and that the Tribunal had set aside. Their other argument is that the Council's decision of 1992, which affords the basis for the individual ones under challenge, shows the same flaws as before, and that the Tribunal has not yet ruled on those flaws, namely, breach of their acquired rights in the serious financial injury they have sustained, and CERN's misapplying the method it had a duty to follow.

7. Judgments 1329 (in re Ball and Borghini) and 1368 explain the procedure for the setting and periodic review of pay at CERN. Staff Rule IV 1.01 says that "The remuneration scales shall be determined and periodically reviewed by the Council", and the Council takes as a "guide" for the purpose movements in the cost of living at Geneva and variations in pay in the department of public utilities of Geneva or the Swiss federal public service.

8. The complainants say that the Council held a debate on 16 December 1994 on the consequences of Judgment 1368; it then chose not to resume the procedure for the adjustment of pay; neither the Finance Committee nor the Council heeded the cost-of-living index, which ought to have been a criterion; and the Council based the pay scales on a budget adopted in 1992 and thereby made an improper exercise of its authority.

9. The plea does not succeed. A fortnight before the Finance Committee's meeting of 28 September 1994 its members got a paper setting out the Tribunal's ruling and saying that their recommendation to the Council should be based on the cost index for 1993 that had been circulated at the time. After a short debate the Committee took note of the paper and unanimously recommended an "increase in salary indexed at 2.46 per cent for 1993". The Council had the same paper before it and endorsed the recommendation. In so doing it did not act in breach of the obligation that Judgment 1368 had laid on it. It approved the rise in pay on the strength of material that cited the relevant criteria. Though it is odd that there was seemingly no discussion of the actual figure of 2.46 per cent there had been such discussion already, in 1992, and so delegates were free to regard further debate as needless. In any event the Tribunal is satisfied on the evidence that neither Committee nor Council treated the earlier conclusions as binding. On that score there was no mistake of law.

10. Again, in putting the rise in pay at the rate already determined by the Director-General the competent bodies took the approved figures of the staff budget for 1993. But, as CERN points out in its reply, the Council would as its sovereign authority have been free to alter the rate by amending the staff budget had it wanted to.

11. The complainants argue that even supposing that the challenged measure does not offend against res judicata it shows the same flaws as those which they pointed out in their first complaint but which the Tribunal did not then rule on: breach of acquired rights and misapplication of the methodology the Council adopted in 1979.

12. As first set out in Judgment 986 (in re Ayoub No. 2 and others) and reaffirmed in Judgment 1368, the case law is

that international officials may allege breach of an acquired right when there is impairment of an essential and fundamental term of conditions of employment; and that is so even where impairment is gradual and due to an accretion of final decisions which are no longer open to challenge and each of which, taken singly, would not itself have been deemed unlawful. The complainants put their cumulative loss at some 10 per cent of the purchasing power of their pay since 1990 - a figure that CERN contests - and say it impairs an essential term of employment. A fall in purchasing power below some critical point may indeed be breach of an official's acquired right. But, save where the written rules require the indexing of pay, not every financial setback the official may suffer will amount to such breach. As was held in Judgment 832:

> "... there will ordinarily be no acquired right when a rule or a clause depends on variables such as the cost-of-living index or the value of the currency. Nor can the finances of the body that applies the terms of appointment be discounted."

13. The Tribunal is satisfied on the evidence that there was no breach of any essential term of employment in CERN's failing, on the grounds of the "economic and financial situation" in its member States, to take full account of trends in the cost of living over several years.

14. But is CERN under a duty to index yearly pay rises? The complainants rely on what they describe as "binding" features of the methodology adopted in 1979 for the yearly review of basic pay scales. According to that methodology pay is to keep pace with the cost of living in Geneva - so as to maintain the purchasing power of agreed levels of pay - and with the net take-home pay certain groups of employees in Switzerland that have been taken for the sake of comparison. The complainants argue that alignment with the cost of living is compulsory because the methodology uses the imperative "shall" whereas, as to the take-home pay of Swiss employees, the process of adjustment is seen as allowing some leeway because the term used is the less binding "should".

15. Ambiguous though the wording may be, the plea fails. The only formal obligation the Council has is in Regulation R IV 1.01:

> "When reviewing remuneration, the Council shall use as a guide an index, the composition and method of calculation of which it shall determine."

As Judgments 1329 and 1368 said, there is no obligation in law to align with the cost of living or with take-home pay. Though CERN must work out the pay rises fairly and objectively, with due regard to the relevant components, the methodology puts it under no obligation to match pay rises to trends in the cost of living in Geneva. That would be tantamount to indexing, and the rules do not require it.

16. The conclusion is that, no wrong arithmetic being alleged, CERN has not acted in breach of the applicable methodology. Nor indeed is there any evidence of failure to discharge the duty of fairness and good faith it owes its staff.

DECISION:

For the above reasons,

The application is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

(Signed)

William Douglas Michel Gentot Egli

A.B. Gardner

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FIRST SESSION

In re ANTOINET (No. 3), AYMON (No. 3),
BALL (No. 4) and BORGHINI (No. 4)

Judgment 1515

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaints filed by Mr. Gérard Antoinet and Mr. Marcel Aymon and the fourth complaints filed by Mr. Derek Ball and Mr. Michel Borghini against the European Organization for Nuclear Research (CERN) on 13 June 1995 and corrected on 31 August, CERN's reply of 13 December 1995, the complainants' single rejoinder of 2 February 1996 and the Organization's surrejoinder of 26 April 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. CERN, an organisation with headquarters at Geneva, has a procedure for the periodic adjustment of staff pay. Judgment 1329 (in re Ball and Borghini) described that procedure under A. And Judgment 1368 (in re Aymon, Ball No. 2 and Borghini No. 2), which was about how to follow it, sent the case back for the Organization to decide on the complainants' pay for January 1993 according to lawfully determined scales.

On 14 and 15 December 1993, at its 247th Session, the Finance Committee recommended that the Council of CERN should set at 1.6 per cent the comprehensive "cost variation index" for the staff budget in 1994. On 17 December, at its 98th Session, the Council endorsed that recommendation and approved the index.

The pay slips that the complainants got on 20 and 21 January 1994 for that month showed rises of some 1.2 per cent. On 11, 14 and 18 March they lodged appeals with the Joint Advisory Appeals Board. In letters of 11 May 1994 to its chairman they challenged the Board's membership, of which they had been informed. On 10 August a new chairman told them that the Director-General had set up an entirely new Board.

Judgment 1368 was published on 13 July 1994. The Administration invited the Finance Committee to recommend, at its meeting of 28 September 1994, that the Council approve retroactive rises in pay for 1993 and 1994, the same procedure having been followed for both years. The Committee recommended rises of 1.2 per cent in pay for 1994.

By a letter of 26 October Mr. Borghini applied to the Director-General for a stay of proceedings pending the Council's decision. The Director-General consented in a letter of 27 October.

At a meeting on 16 December the Council unanimously endorsed the Committee's recommendation. By a letter of 25 January 1995 Mr. Borghini asked the Director-General to say how the decision would affect the pay of each complainant and, if he confirmed the pay rises for 1994 as originally announced, to resume the appeal proceedings.

In letters of 15 March 1995 the Director-General told the complainants that basic pay was raised by 1.2 per cent as from 1 January 1994 and that they could go straight to the Tribunal. By a letter of 5 May 1995 Mr. Borghini informed the Director-General that the complainants were dropping their internal appeals.

B. The complainants submit that CERN acted in breach of its own obligations and of their acquired rights by resuming the procedure for adjustment of pay after the publication of Judgment 1368 and by getting the Council to approve the pay scales that the Director-General had set earlier.

Their first plea is that the Council did not actually exercise its authority to set the budget. All it did in December 1993 was to adopt a comprehensive cost-variation index for the staff budget, thereby leaving the Director-General free to distribute the 1.6 per cent increase between the various heads of expenditure. Again, in September and December 1994, the Finance Committee and the Council endorsed decisions of the Director-General's without considering whether the cost variation index for 1994 was right. They thereby offended against res judicata.

Secondly, CERN neither applied nor even heeded the method it had approved in 1979 of periodic review of pay. It disregarded one thing that the method made it compulsory to take account of: the cost of living at Geneva in the twelve months from August of the year preceding that of review. It made mistakes of fact and law by setting at 1.6 per cent the comprehensive rise in such expenditure in staff in 1994. That figure was quoted in a proposal by one delegation and purported to align the expenditure on staff with rises in such expenditure at the European Molecular Biology Laboratory (EMBL), though there was no basis in law for such alignment. Besides, the rises in pay at the Laboratory were unlawful.

Thirdly, the complainants see breach of their acquired rights in the fall - which they put at some 10 per cent - in the purchasing power of their pay over the past few years.

They want the Tribunal to order CERN to disclose transcripts of the tape recordings - or the tapes themselves - of the discussions that the Finance Committee held on 14 December 1993 and the Council on 17 December 1993 on the cost variation index for 1994. They seek the quashing of the impugned decisions and costs.

C. In its reply CERN says that the Finance Committee took up the matter of the cost variation index on 28 September 1994, and the Council on 16 December 1994. Each of them had before it a paper headed "Salary scales for 1993 and 1994", which CERN had circulated beforehand and which afforded a basis for the recommendation of 1.2 per cent rises in staff pay for 1994.

In the Organization's submission there was no breach of the method of adjusting pay. It was under no duty to heed the cost of living at Geneva, though the Council did take the cost variation index as a guide in putting a figure on the rise in pay. The idea of the 1.6 per cent increase in the staff budget did come from a delegation that wanted the same comprehensive increase at CERN as at EMBL, but the proposal did not rest on the position in fact and law at the Laboratory.

Since the 1979 method is not binding, there can be no breach of any acquired right in granting only part of the rise in pay worked out by that method. In any event withholding the full amount of the increase did not impair the terms of the complainants' employment. CERN contests their estimate of loss of purchasing power.

D. In their rejoinder the complainants enlarge on their pleas and press their claims.

E. In its surrejoinder CERN submits that the complainants' rejoinder offers no new fact or plea that makes any difference to its position.

CONSIDERATIONS:

1. The complainants, who are employees of CERN, are challenging decisions in their pay slips for January 1994. The figures of their pay showed a rise of 1.2 per cent in line with a budget decision that the Organization's Council had taken on 17 December 1993. They began by lodging internal appeals but there was a stay in the proceedings. Judgment 1368 (in re Aymon, Ball No. 2 and Borghini No. 2) ruled that a decision the Council had taken on 18 December 1992 afforded no sound basis in law for the scales of staff pay for 1993. Realising that the scales it had adopted for 1994 were flawed on the same grounds, the Administration decided to put the matter to the Finance Committee and then to the Council so that new scales might be lawfully adopted and made retroactive. On 28 September 1994 the Committee recommended 1.2 per cent rises in pay and on 16 December 1994 the Council approved them. The complainants asked that the internal proceedings resume but the Director-General suggested direct appeal to the Tribunal, and they agreed.

2. They do not deny that CERN has to correct the pay scales. But they have three objections to the decision of 16 December 1994: first, failure by the Council to exercise its authority to set the budget and approve pay scales; secondly, failure to follow the approved method of adjusting pay; and thirdly, breach of acquired rights.

3. The Tribunal's answer to their first objection is in Judgment 1514 (in re Aymon No. 2, Ball No. 3, and Borghini No. 3), also delivered this day. The members of the Finance Committee and the Council had time enough to study the paper explaining how the scales for 1994 had been drawn up and referring to another, distributed earlier, about the cost variation index for 1994. So the material that the competent bodies relied on set out the relevant criteria and they did not fail to exercise their authority to set the budget. Had they so wished, the Committee might have recommended, and the Council approved, bigger rises in pay than those that went through.

4. The second plea is about method. Here again the Tribunal is satisfied on the evidence that, as in its review of pay for 1993, CERN did not overlook the index established for the purpose, though the components of the method are not binding on CERN anyway. But rather more must be said about the charges of mistakes of law and fact in the decision of December 1993 to raise expenditure on staff by 1.6 per cent. True, CERN argues that any mistakes there might have been would make no difference to the challenged decisions since they would have affected only the rise in expenditure on staff for 1994. But

the complainants' plea would succeed if they could show flaws in the setting of the budget that had an effect on the rises in pay. And the Tribunal will be more alert to the possibility of such flaws because expenditure of staff in 1994 went up by 1.6 but staff pay by only 1.2 per cent.

5. The complainants submit that the Council, which sets the budget, erred in law and in fact by purporting to align pay rises at CERN and at the European Molecular Biology Laboratory (EMBL). They adduce cogent evidence to show any parallels that might have been drawn between pay rises at EMBL and the staff budget at CERN to be misleading and quite irrelevant. But they fail to prove that the Council meant to follow EMBL in setting at 1.6 per cent the increase in expenditure on staff. There was bitter debate in the Finance Committee on 14 and 15 December, and one delegation did suggest a comprehensive increase of 1.6 per cent, "as at EMBL", whereas the Administration wanted 4.53 per cent and some delegations wanted no increase at all. In the end, after several ballots, the figure of 1.6 per cent was carried. But it was a laborious compromise and there were no grounds for supposing that any analogy was drawn as to the position of staff between the two organisations. In endorsing the Committee's recommendation the Council said nothing of the Laboratory. There is no reason to allow the complainants' application for disclosure of the recordings of debate in the Committee and the Council. Those bodies have approved the minutes, which are therefore to be taken as an authentic record of the proceedings. There is no merit in the complainants' plea of mistakes of law and fact in the setting of the budget that determined the amount of the pay rises.

6. Their last plea is breach of acquired rights. Quibbling over figures aside, the 1.2 per cent rises in staff pay were obviously not enough to offset the fall in average purchasing power over the last few years: far from it. Yet the trend does not amount to breach of a fundamental term of the appointment of CERN staff. The plea fails in Judgment 1514, also delivered this day, as to the pay rises for 1993. It fails as to 1994 too.

7. Since the complainants' case does not succeed they get no costs.

DECISION:

For the above reasons,

The complaints are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

(Signed)

William Douglas Michel Gentot Egli

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL | INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF | *ADMINISTRATIVE TRIBUNAL*

Registry's translation,
the French text alone
being authoritative

EIGHTY-FIRST SESSION

In re GREENE-CHAMBERLAIN (No. 2) Judgment 1516

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mrs. Lillian Greene-Chamberlain against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 27 February 1995 and corrected on 7 July, UNESCO's reply of 25 October, the complainant's rejoinder of 22 December 1995 and the Organization's surrejoinder of 31 January 1996;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant's career at UNESCO and the background to the present dispute are summed up under A in Judgment 1233 of 10 February 1993. She had claimed, among other things, the quashing of a decision on the degree of permanent invalidity she was suffering from on account of assault on the premises of UNESCO on 12 July 1979. The judgment dismissed her claims on the grounds that she had failed to exhaust the internal means of redress.

As the judgment explained, the acting chief of the Staff Pensions and Insurance Division informed her on 17 January 1990 that the Director-General had endorsed a recommendation from the Advisory Board on Compensation Claims to set at 18 per cent the degree of her permanent partial invalidity. That entitled her, according to the scale of compensation, to payment of 24,166.80 United States dollars.

Under Article 18 of the Rules of the Staff Compensation Plan a claimant may apply for "reconsideration" within thirty days of getting notice of the Director-General's decision. If the claimant does so on medical grounds a medical board is set up and reports to the Advisory Board on Compensation Claims, which in turn reports to the Director-General.

By a memorandum of 16 February 1990 the complainant told the acting chief of the Staff Pensions and Insurance Division that she wanted to be paid the amount on offer but had reservations about it. In another memorandum of even date to the Director-General she challenged the decision of 17 January under paragraph 7 of the Statutes of the Appeals Board. By a memorandum of 7 May she informed the acting chief of the division that she was pressing the "claim put to the Director-General" on 16 February 1990. In a memorandum of 31 July she submitted to the acting chief the name of a doctor who should represent her if there was another medical enquiry. After the Director-General had rejected her claim of 16 February she went to the Appeals Board on 25 June 1990. The Board recommended rejecting her appeal, the Director-General did so on 16 May 1991, and on 14 August 1991 she lodged her first complaint impugning that decision.

On 4 November 1991 her doctor named a specialist to sit on the medical board, and by a letter of 8 September 1992 her counsel submitted the name of another to the chief of the Staff Pensions and Insurance Division and asked that the board meet as soon as possible. In her reply of 14 September 1992 the chief of division said she would put the two names to the Organization's chief medical adviser and the board could then meet.

On 7 January 1993 the complainant lodged a claim with the Director-General pointing out that UNESCO had neither given her a final decision on compensation nor convened the medical board; she sought waiver of the internal procedure and leave to go straight to the Tribunal to challenge what she described as "non-decision". On 25 March the Director of the Bureau of Personnel told her that the Director-General had refused her claim of 7 January. On 1 May she gave notice of appeal to the Appeals Board against that decision and the "implied rejection" of her claim. In its report of 14 June 1994 the Board unanimously recommended setting up the medical board within one month in line with Article 18.2.1 of the Rules of the Staff Compensation Plan. By a letter of 12 August 1994, which she impugns, the Director-General rejected her appeal.

B. The complainant says that she is challenging the Director-General's refusal to take a final decision on compensation for the consequences of the assault she suffered in 1979. For all her efforts UNESCO has taken no action to settle the case. It refused to act on the request for review she put to the acting chief of the Staff Pensions and Insurance Division on 16 February 1990 and confirmed on 7 May. It then obstructed the setting up of the medical board even though as early as 31 July 1990 she had named a doctor to represent her.

Because of UNESCO's bad faith and lack of diligence the Tribunal should now declare the amount of compensation she is entitled to. Pressing the pleas she put forward in support of her first complaint, she contends that the decision of 17 January 1990 setting at 18 per cent the degree of her permanent invalidity was tainted with procedural flaws and mistakes of fact, neglected material facts and rested on an obvious misappraisal of the evidence.

She invites the Tribunal to set aside the decision of 12 August 1994, to declare that the defendant has failed to act, to make its own ruling on the degree of her invalidity and to award her damages for the unusually serious material and moral injury she has sustained. She claims costs.

C. In its reply UNESCO argues that her complaint is irreceivable.

First, it contends, she has never sought review within the meaning of Article 18.1 of the Rules of the Staff Compensation Plan. The "claim put to the Director-General" which she says she pressed on 7 May 1990 is none other than the one she made on 16 February 1990 under the Statutes of the Appeals Board. Nor does the letter of 31 July 1990 constitute such request for review. Even if it did it would have been time-barred. Since she failed to exhaust the available means of redress the Director-General may not be deemed to have refused a final decision on compensation. Though he may under Article 18.1 waive the time limit, her case is not such as to warrant waiver.

Secondly, the claims she put to the Appeals Board on 1 May 1993 differ from those in her letter dated 7 January 1993, just as the claims in her complaint go beyond those she put to the Board.

Thirdly, by claiming the quashing of the decision of 17 January 1990 without following the procedure in Article 18.1 she disregards Judgment 1233. Her claims offend against res judicata.

In subsidiary argument on the merits the Organization contends that the decision of 17 January 1990 was fully warranted and shows no fatal flaw.

D. In her rejoinder the complainant answers the Organization's objections to receivability and presses her case on the merits.

As the Tribunal acknowledged in Judgment 1233 under 8 she duly submitted a request for reconsideration of the decision of

17 January 1990. Having consistently acknowledged that she did make that request, UNESCO is estopped from denying its existence. And having itself held up the internal proceedings it may not properly argue that she has failed to exhaust her remedies.

E. In its surrejoinder UNESCO maintains that it got no request for reconsideration of the decision of 17 January 1990. Appeal lies only against a "non-reply", not the meaningless "non-decision" she alleges. Besides, as Judgment 1233 said under A, the Appeals Board observed in its report of 4 April 1991 that she had failed to make a request to the Director-General under Article 18.1.

CONSIDERATIONS:

1. UNESCO first employed the complainant in 1978 as chief of the Unit of Physical Education and Sport in its Education Sector. On 12 July 1979 another member of the staff assaulted her and UNESCO treated the assault as a service-incurred accident. Her health grew steadily worse, as was recounted in Judgment 1233 of 10 February 1993 on her first complaint. The Organization dismissed her for reasons of health at 31 March 1988. There ensued disputes about the lawfulness of dismissal and the reckoning of her pension rights and compensation. In Judgment 1233 the Tribunal dismissed her various claims.

2. One of those claims was to the quashing of a decision by the Director-General to set at 18 per cent the degree of her permanent invalidity attributable to the assault in 1979 and to grant her 24,166.80 dollars in compensation. The Tribunal allowed the Organization's objections to the receivability of the claim on the grounds of her failure to exhaust her internal remedies: to determine how the assault had affected her health and the extent of UNESCO's liability, she had first to put a request for reconsideration to the Advisory Board on Compensation Claims in accordance with Articles 18.1 and 18.2.1 of the Rules of the Staff Compensation Plan.

3. Believing that the Organization was able "neither to take a decision nor even to set up the medical board", she filed a claim with the Director-General by a letter of 7 January 1993. She sought leave to file a complaint directly with the Tribunal against what she described as "non-decision", or rather, in her view, rejection of her claim to a decision on the amount of compensation. In his reply of 25 March 1993 the Director-General refused her leave to go directly to the Tribunal. She then went to the Appeals Board. The Board

declared her appeal receivable and recommended asking the Advisory Board on Compensation Claims to convene a medical board within one month under Article 18.2.1 of the Rules of the Staff Compensation Plan. The Director-General chose not to do so and rejected her appeal in a letter dated 12 August 1994. It is that letter, which she seems not to have got until 28 November 1994, that she is now impugning.

Receivability

4. UNESCO argues that the complaint is irreceivable on three counts: the impugned decision is not challengeable; her claims are new ones; and she is in breach of res judicata. The pleas fail for the following reasons.

5. On 25 March 1993 the acting Director of the Office of International Standards and Legal Affairs wrote a letter to her counsel and the Director of the Bureau of Personnel sent another to the complainant herself. The letters gave notice of the Director-General's refusal to waive the internal appeal procedure and let her go straight to the Tribunal. The reasons were substantive and the letters cannot but be construed as rejecting her request of 7 January 1993. So the Director-General's decision is indeed challengeable before the Tribunal.

6. The Organization is again wrong to argue that she has never sought reconsideration, as required under the Rules of the Staff Compensation Plan, of the decision setting the degree of her invalidity at 18 per cent and so has no adverse decision to impugn on that score.

7. It is true that as worded her original claims were not about the degree of her invalidity but challenged, among other things, the amount of compensation. But there is much evidence to show that the competent units of the Organization did realise she was seeking review on medical grounds and that they began the process of setting up the required medical board. Thus on 28 May 1990, in reply to a letter she had written on 7 May, the acting chief of the Staff Pensions and Insurance Division referred her to Article 18.2.1 of the Rules of the Staff Compensation Plan and asked her to reply before the submission of her "appeal for reconsideration" to the competent board. Her reply of 31 July 1990 was that she would undergo further medical examination if the Organization thought it necessary, but only provided that that would not prolong unduly an already lengthy procedure, and she named a doctor to sit on the board. In a further letter of 29 January 1991 UNESCO sought to dissuade her from having a medical board set up. But she answered on 13 February that she was pressing her appeal under Article 18.2.1 of the material Rules and wanted the entire case records to go to that board. In a reply dated

29 March 1991 the Organization told her that the medical board would meet as soon as possible; it would be made up of the doctor she had named, the chief medical officer and a third doctor to be appointed by the other two; and it would examine her at a time and at a place in the United States that it would itself decide. The process of setting up the medical board crept on. Thus a letter of 14 September 1992 told her that it could be set up after the chief medical officer had got back from several days' leave.

8. The upshot is that both the complainant and senior officers believed that review was on the way. Indeed the Organization said in its reply to her first complaint that reconsideration under Articles 18.1, 18.2.1 and 18.2.3 of the Rules of the Staff Compensation Plan was "now under way", and it was for that very reason that the Tribunal upheld the plea that her first complaint was irreceivable for failure to exhaust her internal remedies. So it is odd to find the defendant now arguing that she had to get an express decision before seeking review: the months and months of correspondence gave her sound reason to believe that UNESCO was reviewing the case and even making the required arrangements.

9. UNESCO's second objection must also fail. It argues that the claims she has put to the Appeals Board and to the Tribunal were not covered by her application of 7 January 1993 for leave to come straight to the Tribunal. As was said in 3 above, her letter of 7 January 1993 expressly objected to the Organization's "failure to take a decision, or even convene the medical board it had itself demanded", and she sought leave to put her case to the Tribunal and challenge UNESCO's refusal to entertain her claim to the determination of compensation. So the plea about receivability under this head is mistaken.

10. The plea of res judicata cannot succeed either. The reason that Judgment 1233 gave for dismissing her claims about the degree of her permanent invalidity was that, as UNESCO acknowledges, an 18.1 reconsideration was under way and she had therefore failed to exhaust her internal remedies. Things have since changed: though the process of review is not over, the reason for that is the Organization's own refusal even to acknowledge that the process ever began, let alone carry it out and reconsider the determination of her invalidity. Quite obviously Judgment 1233 cannot arrest the case so as to frustrate her right to due process.

The merits

11. The answer to the complainant's case follows from what has just been said about receivability. Merely on the strength of the medical records a doctor set the degree of her

permanent invalidity at 18 per cent, the process of review of that determination has begun and there is no reason not to complete it. As the Appeals Board observed in its unanimous report, clinical examination of the complainant is indispensable and the Advisory Board on Compensation Claims should be asked to call the medical board at once to carry out that examination so that the process of review can be completed.

12. The complainant wants the Tribunal to "declare that UNESCO has failed to act and itself make the final determination that the Organization has for years been refusing" her. Having put up with years of dilatoriness and prevarication, she is understandably anxious to have her entitlements speedily determined. Being unable, however, to rule on the medical aspects of her case, the Tribunal has no choice but to send the case back to the Organization for completion of the process of review in keeping with the rules.

Damages

13. The complainant seeks not just review of compensation but also damages for the material and moral injury she has sustained on account of UNESCO's refusal to take up her claim. The Tribunal is satisfied on the evidence that the defendant has been guilty of wrongful dilatoriness and shifts of position. It will award her damages for moral injury on that count, and in the light of all the circumstances of the case it sets the amount *ex aequo et bono* at 5,000 dollars.

Costs

14. She is awarded costs, and the figure is set at 15,000 French francs.

DECISION:

For the above reasons,

1. The Director-General's decision of 12 August 1994 is set aside.

2. The case is sent back to UNESCO for reconsideration of the complainant's claim to compensation under Articles 18.1 and 18.2.1 of the Rules of the Staff Compensation Plan.

3. UNESCO shall pay her 5,000 United States dollars in moral damages.

4. It shall pay her 15,000 French francs in costs.

5. Her other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

(Signed)

William Douglas Michel Gentot Egli

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

EIGHTY-FIRST SESSION

In re GOETTGENS (No. 2) Judgment 1517

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Johannes Karl Wilhelm Goettgens against the European Patent Organisation (EPO) on 16 September 1994, the EPO's reply of 6 December 1994, the complainant's rejoinder of 22 August 1995, his amendment thereto of 14 September and the Organisation's surrejoinder of 9 November 1995;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a German born in 1928, was an official of the European Patent Office, the secretariat of the EPO, from 1979 until he retired on 1 March 1992. He joined the Office on secondment from the German national administration. He had been employed by the German Patent Office since 1966, first as a salaried employee and then as a civil servant.

Since he was unable to transfer accrued rights from the German scheme to the EPO's, he qualified under Article 46 of the Office's Pension Scheme Regulations for so-called "enhancement of benefits".

By a memorandum of 11 March 1992 the Administration sent him a reckoning of his Article 46 entitlement.

In a letter of 29 May he appealed to the President of the Office against the decision to base his entitlement on the "retrospective insurance value" of his accrued rights rather than their actuarial equivalent or some other fixed value.

The President referred his case to the Appeals Committee and in a report dated 31 May 1994 the Committee recommended rejecting his appeal. By a letter of 7 July 1994, which he impugns, the Director of Staff Policy told him that the President had decided to endorse the Committee's recommendation.

B. The complainant submits that the reckoning of his "enhanced" benefits was unlawful. Under Rule 46.1/1(i) of the Implementing Rules to the Pension Scheme Regulations the calculation should have been based on the amount of a theoretical transfer which the administrators of the original pension scheme certify to be "the actuarial equivalent or any other fixed value" representing his accrued pension rights. But the EPO based its calculations on a theoretical retrospective insurance value ("Nachversicherungswert"), for which it had no certification from the German authorities.

Even if the EPO had been right to use a theoretical retrospective value its reckoning could not stand since it concerns but a fraction of his pension rights. In the complainant's submission his enhancement should be six times greater and take account not only of his years in the German civil service but also of his industrial experience.

He wants the Tribunal to (1) set aside the decision of 7 July 1994; (2) order the recalculation of his entitlement under Article 46 of the Pension Scheme Regulations; (3) declare that the theoretical retrospective insurance value in the amount of 63,135.54 German marks is "neither the actuarial equivalent nor a capital payment in respect of all [his] retirement pension rights" under the German scheme; (4) order that the "recalculation be made on the basis of the number of years of service that would have been calculated according to Article 12 of the Pension Scheme Regulations using the actuarial equivalent of [his] retirement pension rights accrued under the German pension scheme or that the Office shall determine the number of years of service which it will take into account in consideration of the value of all my German pension rights"; and (5) grant him interest on the amounts due.

C. In its reply the EPO submits that the complaint is devoid of merit. It applied the material rules properly. Under Rule 46.1/1(i) the complainant may not choose between an actuarial equivalent and some other fixed value representing acquired pension rights. Nor may the Organisation choose between the amount certified by the administrator of the former pension scheme under 46.1/1(i) and its own reckoning under 46.1/1(ii). So it had to use the German administration's figures.

D. In his rejoinder the complainant enlarges on his pleas explaining by how much the Office docked his entitlements under the German scheme. He rephrases his third head of claim and adds a sixth, to costs.

E. In its surrejoinder the Organisation observes that in Judgment 1456 (in re Belser and others) the Tribunal dismissed complaints on the very same issues that the complainant is raising. In any event he will be able to transfer his German pension rights to the EPO's own scheme under the terms of an agreement being worked out between the Organisation and the German authorities.

CONSIDERATIONS:

1. The complainant was employed in the German Patent Office from 1966 and joined the staff of the European Patent Office on 1 April 1979. At the time of his retirement on 1 March 1992 he held the post of director at grade A5. The present dispute arises out of the EPO's reckoning of the adjustment of his pension entitlements under its Pension Scheme Regulations so as to take account of his period of service in the German Patent Office.

2. The complainant challenged the EPO's computation and filed an internal appeal asking, among other things, that his pension be adjusted on the strength of the actuarial equivalent of his pension rights from his former employment, not the theoretically transferred "Nachversicherungswert", or retrospective insurance value. In a report of 31 May 1994 the Appeals Committee recommended against allowing his appeal and on 7 July the President of the Office rejected it. He asks the Tribunal to hold that the retrospective insurance value is neither the actuarial equivalent nor the "fixed value" of all his retirement pension rights accrued under his former employment. He further asks that the recalculation of his pension be based on the number of years of service arrived at by using the actuarial equivalent of his pension rights accrued in his previous employment or by taking into account the value of all the pension rights he acquired in the employ of the German Government.

3. Where a staff member has previous government service Article 12(1) of the Pension Scheme Regulations provides for the "payment to the Organisation ... of any amounts corresponding to the retirement pension rights accrued under the previous pension scheme". But since the structure of the German Patent Office does not permit transfer under Article 12 the complainant became entitled to an enhancement of benefits under Article 46(1) of the Pension Scheme Regulations based on:

> "(i) the difference between the rate of salary applicable for the grade and step reached at the date of

> departure or death and the rate of salary current for his starting grade and step in the Office at that date, and
>
> (ii) the number of years of service that would have been credited under Article 12 paragraph 1 if a transfer payment had been made."

that is to say - to quote Article 12(1) - "by reference to his grade on confirmation of appointment and to the Implementing Rules hereto, the number of years of reckonable service" under the EPO pensions scheme.

Implementing Rule 46.1/1 further provides:

> "(i) The number of years of service in question shall be calculated on the basis of the amount of a theoretical transfer calculated in accordance with the conditions laid down in Article 12, paragraph 1. The afore-mentioned amount shall be that which the department or institution responsible for administering the previous pension scheme is able to certify as being the actuarial equivalent or any other fixed value representing retirement pension rights acquired under that scheme before departure. Pension rights acquired by means of voluntary contributions shall be disregarded.
>
> (ii) Where the institution responsible for administering the previous pension scheme is unable to provide such a certified statement, the Office shall determine in each case the number of years of service which it will take into account."

4. In Judgment 1456 (in re Belser and others) of 6 July 1995 the Tribunal ruled on claims by other retired staff members of the EPO in a position similar to the complainant's who had sought the quashing of decisions by the President of the Office to apply the retrospective insurance value established by the German national administration for the purpose of enhancing pension benefits under Article 46 of the Regulations. That judgment dismissed the complaints on the grounds, among others, that the Tribunal would neither order the Organisation to negotiate with a member State nor set the objectives of any such negotiation. In the instant case the same reasoning applies. Being unable to obtain the figure of the actuarial equivalent, the EPO had to rely on "any other fixed value" representing pension rights accrued under the former employment and once the competent German authority gave its certificate was bound by Implementing Rule 46.1/1 to apply the certified amount in calculating the enhancement of the staff member's pension.

5. The complainant seeks to distinguish his own case in that he was employed in the German Patent Office first as a salaried employee and later as a civil servant. But the retirement pension rights covered by Article 12(1) are rights under a previous pension scheme certified as prescribed in Rule 46.1/1(i) of the Implementing Rules. In this case it is the rights certified by the national authority. Whether such rights should include those that arise from contributions to a social security scheme would depend on whether they are taken into account under the pension scheme of the German Patent Office.

6. The complainant further contends that the EPO assigned him to a lower starting grade than the one the Service Regulations provides for. But since he did not duly challenge his starting grade he may not now plead that his case is different on that account from those that the Tribunal dismissed in Judgment 1456.

7. Lastly, he argues that the "Nachversicherungswert" did not reflect all his pension rights, including those resulting from his social security coverage. All that the Tribunal need point out on that score is that once the competent authority has certified a fixed value representing acquired pension rights there is no provision in the Pension Scheme Regulations for varying or setting aside the certificate.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

Wm Douglas
William Douglas

Mella Carroll
Mella Carroll

Mark Fernando

AB Gardner
A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

EIGHTY-FIRST SESSION

In re GOETTGENS (No. 3) Judgment 1518

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr. Johannes Karl Wilhelm Goettgens against the European Patent Organisation (EPO) on 28 September 1995, the EPO's reply of 20 December 1995 and the complainant's letter of 16 January 1996 informing the Registrar of the Tribunal that he did not wish to rejoin;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to this case are set out, under A, in Judgment 1517 on the second complaint of Mr. Goettgens, also delivered this day.

Since 1 March 1992 the complainant has drawn a retirement pension from the EPO. Since 1 January 1993 he has also been receiving a pension he earned as an official in the German civil service. His German entitlements include the "Ortszuschlag", or local weighting allowance, part of which is known as the "Ehegattenanteils", or spouse's share.

By a letter of 9 March 1993 an officer in the Remuneration and Pensions Department informed him that the Administration was reducing his household allowance as from 1 January 1993 by the amount of the spouse's share of his local weighting.

The complainant objected in letters dated 13 March and 24 May to the Administration. The pension officer answered his objections in two letters, of 24 March and 29 June. In the latter he stated the basis in law for the reduction.

On 22 September 1993 the complainant lodged an internal appeal, which the President of the European Patent Office referred to the Appeals Committee. In its report of 12 April 1995 the Committee unanimously recommended allowing the appeal.

In a letter of 4 August 1995 the Director of Staff Policy informed him that the President had rejected his appeal. That is the decision under challenge.

B. The complainant submits that the reduction of his household allowance is unlawful. He alleges misappraisal of the facts. Since the household allowance from the EPO and the so-called "spouse's share" of the local weighting are not granted for the same reasons the Organisation is wrong to treat them as "of like nature". Under German law he is entitled to a spouse's share for reasons of age alone, whether he has a wife or not. In any event the only lawful reason for reducing his household allowance would be on account of his wife's earnings, and she has none.

He seeks the quashing of the decision of 4 August 1995 and payment in full of the household allowance as from 1 January 1993 plus interest on the amounts wrongfully withheld. He claims costs.

C. In its reply the Organisation contends that the complaint is irreceivable because the complainant's internal appeal was time-barred. Since the letters of 9 and 24 March 1993 gave him "sufficient" explanation of the reasons for reducing his allowance the three-month time limit in Article 108 of the Service Regulations ran from the date at which he received the letter of 24 March.

In subsidiary argument the EPO contends that the complaint is devoid of merit. There was nothing improper in docking from his household allowance amounts which he receives and which are of like nature from another source. Contrary to what he makes out, it is because he is married that his local weighting includes a spouse's share.

CONSIDERATIONS:

1. The complainant has been receiving since March 1992 a retirement pension from the EPO; since January 1993 a civil service pension from the German Patent Office, which employed him before he went to the EPO; and since August 1993 a German social insurance pension. His EPO pension also includes a household allowance: Article 28(1) of the Pension Scheme Regulations entitles the recipient of such a pension to the family allowances provided under Article 67(1) of the Service Regulations.

2. Under Article 67(2) a staff member in receipt of family allowances must declare any allowance "of like nature" paid "to him, to his spouse or to his dependants from other sources", and it is to be deducted from those paid under the Service Regulations.

3. In February 1993 the Regional Finance Office in Munich informed the EPO that the German civil service pension that the complainant had been receiving since January 1993 was supplemented by a local weighting allowance, known as an "Ortszuschlag", which included a married person's component, or "Ehegattenbestandteil". When that component is paid the allowance is said to be at "level 2"; when it is not, it is at "level 1".

4. By a letter of 9 March 1993 the Remuneration and Pensions Department of the European Patent Office informed the complainant that since that component of the local weighting allowance - 81.42 German marks a month - was attributable to his having a wife the amount must be deducted from his EPO pension, in accordance with Article 67(2), as from 1 January 1993, the date at which his German civil service pension had become payable.

5. In a reply of 13 March the complainant protested that Article 67(2) did not apply to pension payments. On 24 March the Department wrote again pointing out that according to Article 28 of the Pension Scheme Regulations family allowances were "granted under the Service Regulations". By a letter of 24 May 1993 the complainant continued to question the lawfulness of the deduction and the correctness of the figure to be deducted. By a letter of 29 June 1993 the Department said that they had consulted "the Office's lawyers", quoted the lawyers' opinion, explained why it was necessary to deduct the married person's component and enclosed the text of the Department's letter of enquiry of 15 February 1993 to the Regional Finance Office. On 22 September 1993 the complainant lodged his internal appeal.

6. The Appeals Committee reported on 12 April 1995. It held that the grant of the household allowance depended on "family status"; that the difference between levels 1 and 2 of the local weighting allowance was paid automatically, "regardless of family status", to any German civil servant who, like the complainant, had been born before 1 January 1936; and that that difference was not "of like nature" to the EPO's household allowance and was therefore being "wrongly deducted from the appellant's household allowance". The Committee recommended that the President of the Office allow his appeal and reimburse the sums wrongfully deducted.

7. By a letter of 4 August 1995 the Director of Staff Policy informed the complainant that the President rejected his appeal. That is the decision he impugns in his complaint, which he filed on 28 September 1995.

Receivability

8. The EPO contends that the complaint is irreceivable under Article VII(1) of the Tribunal's Statute because the complaint has failed to exhaust the internal means of redress. Its final decision was in its letter of 9 March 1993 or at the latest in its letter of 24 March, and he should have filed his internal appeal against that decision within the time limit of three months in Article 108(2) of the Service Regulations. Not having appealed until 22 September, he was out of time.

9. The Organisation's plea fails. Its letters answering the complainant's objections show that not until 29 June 1993 did the head of the Remuneration and Pensions Department, after consulting the Office's lawyers, take the final reasoned decision that was subject to internal appeal.

The merits

10. After the Appeals Committee had reported the Remuneration and Pensions Department wrote a letter dated 26 June 1995 to the German Regional Finance Office asking whether the allowance in dispute was being paid to the complainant because he was married or because he had been born before 1 January 1936. The Regional Finance Office answered on 11 July 1995 that the complainant did not benefit under the provisions that entitled an unmarried civil servant who had reached the age of 40 by 1 January 1976 to payment of the married person's component of the local weighting allowance: the complainant was already married by that date. In conveying the impugned decision the Director of Staff Policy stated that the Regional Finance Office had confirmed that it was because he was married that he was getting the "Ortszuschlag" paid at level 2.

11. The decision by the President of the Office on the complainant's internal appeal was made on the strength of the letter of 26 June 1995 and the reply of 11 July - mentioned in 10 above - which the complainant had never seen and which the Appeals Committee had not considered. That constituted a gross breach of due process. Article 113(1) of the Staff Regulations, which is about the procedure before the Appeals Committee, reads:

> "The papers submitted to the Appeals Committee shall include all the material necessary for the investigation of the case. They shall also be transmitted to the appellant."

Article 113(3) gives the appellant "the right to be heard" and 113(4) states:

> "The appellant shall be informed of any document or new factor produced during the investigation. If such information is given after he has been heard, the appellant may ask to be heard again or state his attitude in writing."

12. Because of the breach of due process the President's decision must be set aside. The EPO's letter of 26 June 1995 to the Regional Finance Office was badly drafted and failed to elicit a clear answer to the relevant question: was the complainant entitled to the payment of the local weighting allowance at level 2 because he had been born before 1 January 1936, whether he was married or not? The case will be sent back to the President of the Office for a new decision after resubmission of the case to the Appeals Committee, which should consider the complainant's contention that Article 28(3) of the Pension Scheme Regulations permits deductions from pension payments only in respect of allowances received from other sources for children.

13. The complainant is entitled to an award of costs.

DECISION:

For the above reasons,

1. The decision of 4 August 1995 by the President of the Office is quashed.

2. The case is sent back to the President for a new decision after resubmission of the case to the Appeals Committee.

3. The Organisation shall pay the complainant 1,000 German marks in costs.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

Wm Douglas   Mella Carroll

William Douglas   Mella Carroll   Mark Fernando

A.B. Gardner

A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FIRST SESSION

In re PRADOS, RAMALINGAM,
TANDART and WRIGHT

Judgment 1519

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Miss Ana Maria Prados, Mr. Bala Ramalingam, Miss Françoise Maryvonne Tandart and Mrs. Jane Angela Talbot Wright against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 2 June 1994 and corrected on 12 May 1995, UNESCO's reply of 16 October 1995, the complainants' rejoinder of 19 January 1996 and the Organization's surrejoinder of 28 March 1996;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up a follows:

A. The International Civil Service Commission (ICSC) sets pay scales for staff of organisations in the common system of the United Nations who belong to the General Service category. Its function is described under A in Judgments 1000 (in re Clements and others) and 1265 (in re Berlioz and others), among others. In performing that function it follows what is called a "general methodology" so as to assess the best prevailing conditions of employment at headquarters duty stations. It approved the methodology in 1982, and revised it in 1988 and 1992, in line with the "Flemming principle", which Judgment 1000 explained. In accordance with Article 12.3 of its Statute the Commission carries out salary surveys in consultation with the executive heads and staff representatives.

In its yearly report of 29 September 1992 to the General Assembly of the United Nations the Commission mentioned changes in the methodology while "reaffirming" its commitment to Flemming. By resolution 47/216 of 23 December 1992 the Assembly decided that the changes would enter into force for the survey that the Commission was to make in 1993 of the best prevailing conditions of service in Paris.

In October 1992, while arrangements went ahead for that survey, the staff associations of UNESCO said that they declined to take part on the grounds that the changes in the methodology were bound to have damaging effects on the pay of the General Service staff.

The Commission set out the revised methodology in a report of 14 April 1993 on the work of its 37th Session. From 13 April to 11 May 1993 it gathered data on pay with help from the Administration of UNESCO. It analysed them at its 38th Session, from 15 July to 3 August. In a report dated 17 September 1993 it approved the pay scales based on the Paris survey and recommended applying them at a date which the Director-General might set at discretion.

By administrative circular 1902 of 6 January 1994 the acting Deputy Director-General told the staff that the new scales for the General Service category took effect as from 1 January 1994.

The complainants belong to the General Service category of staff of UNESCO. In letters of 15 February 1994 to the Director-General they protested against both circular 1902 and the individual applications thereof in their pay slips for January. By memoranda of 8 March 1994 the Director of the Bureau of Personnel answered that the Director-General was upholding the disputed decisions and giving them leave to put their case directly to the Tribunal. Those are the decisions they are impugning.

B. The complainants submit that the scales brought in on 1 January 1994 are unlawful because they are at odds with the Flemming principle. They have three pleas.

First, some features of the revised methodology do not square with the principle. For one thing, the new notion of "cost to the employer", introduced so as to put figures on fringe benefits, distorted the results of the Paris survey. By the old method the value of such goods or services was reckoned to be the difference between the price the employer put on them and their value on the open market. For another thing, the Commission left two items out of the comparison of conditions of service: in-service training and merit increments.

Secondly, the complainants contend that the Commission's survey was in breach of two provisions of the revised methodology. Some fringe benefits are to count only if at least half the staff actually draw them. The Commission put an illogical construction on the rule by discounting housing loans on the grounds that few officials applied for one in any given year. Over a longer period many have got such loans. The other breach was the Commission's failure to compare social benefits at and outside UNESCO and to recommend that the Organization bring practice into line with the best prevailing conditions in the locality of the duty station.

Lastly, by refusing to adapt the methodology to local conditions the Commission was again in breach of Flemming. Under the revised methodology the Commission had to choose a suitable number of representative jobs from among all UNESCO posts. So for the survey to be reliable there had to be a system of grading of posts. In October 1992, when jobs were picked for the 1993 survey, UNESCO had not yet completed its grading system. Besides, the Commission failed to compare pay at equivalent levels of seniority.

The complainants say they cannot assess the financial consequences of the repeated breach of Flemming, but the cumulative effects thereof show the Commission's resolve to bring down pay for staff in the General Service category.

They seek the quashing of the decisions of 8 March 1994; referral of their case to the Organization for recalculation in compliance with Flemming of the pay scales applicable at 1 January 1994; and payment as from that date of the difference between the figures of pay due according to the new scales and the sums already paid under the ones they challenge, plus interest at the rate of 10 per cent a year since 1 January 1994. They seek costs.

C. In its reply UNESCO cites Judgment 1265, which says that the Tribunal will not interfere with the exercise of discretion inherent in drawing up pay scales. In any event pay fell because the conditions of comparable service in Paris declined and because the survey counted pay of UNESCO General Service staff who were above step 11 of their grade.

As for the evaluation of fringe benefits, UNESCO points out that even the methodology of 1982 had included references to the notion of cost to the employer and that in any event such benefits had precious little effect on the results of the survey. In-service training is too abstract an idea to be treated as reward for services rendered. There is no breach of Flemming in discounting merit increments because they are exceptional and by their very nature cannot form part of standard conditions of service.

There were several reasons for discounting housing loans. For one thing, wage earners in like jobs outside UNESCO did not qualify for such loans partly on account of the level of their pay. For another, even over five years, fewer than half the staff got loans. As for social benefits, the data the Commission garnered covered social security and health insurance. The methodology does not require of it any recommendation on such items but leaves each organisation free to align policy as it sees fit with the best prevailing outside conditions.

As to the Commission's not limiting the number of jobs covered by the survey, the methodology requires taking fourteen to twenty. The survey took account of the full range of duties of General Service staff provided that the posts were not untypical of the grade they bore. Since the grading of posts goes on all the time, completing the exercise cannot be made a condition for carrying out a survey.

The adoption of the new scales that were the outcome of the survey caused the complainants no injury. The Organization took several measures to safeguard pay, one being the introduction of a temporary personal allowance to make up the difference between what staff would have got at 1 January 1994 on the old scales and the payments made to them according to the new ones.

D. The complainants press their pleas in their rejoinder. In their submission the evaluation of fringe benefits according to cost to the employer has become the rule whereas under the former methodology it was the exception. That makes a great difference.

E. In its surrejoinder UNESCO maintains that the new scales are fully in line with Flemming.

CONSIDERATIONS:

1. The complainants, who belong to the General Service category of staff at UNESCO, are challenging pay scales for 1994 which the Director-General adopted on a recommendation from the International Civil Service Commission (ICSC) and which were reflected in their pay slips for January 1994. The Commission drew up the new scales after carrying out a survey into general conditions of service in Paris in 1993. Their effect was to freeze the pay of staff in the General Service and related categories. In the complainants' submission some features of the "methodology" of the survey were at odds with the "Flemming principle", and actually applying the methodology resulted in breaches of the principle. They further charge the Organization with failing to cooperate properly with the staff representatives and causing the complainants actionable injury.

2. Before taking up those pleas some explanation is required of the rules for setting pay in organisations like UNESCO that belong to the "common system" served by the Commission.

(a) At its 15th and 37th sessions the Commission reaffirmed the Flemming principle, which dates back to 1949. The principle requires organisations to offer staff in the General Service category conditions of employment on a par with "the best prevailing conditions of employment in the locality" - i.e. salary and other basic components of pay - "without being necessarily the best local conditions". UNESCO's rules embody the principle. Thus Staff Rule 103.1(b) reads:

> "The annual salaries of staff members in the General Service category ... shall be established, in accordance with the decisions of the General Conference, in order to maintain conformity between them and the best prevailing rates for comparable employment in the Paris area."

(b) To assess conditions of employment at headquarters - and elsewhere if need be - the Commission carries out thorough surveys of representative employers in the area of the duty station comparing like outside jobs with like posts in the organisation. Surveys are not confined to actual take-home pay but take also into account benefits in cash or in kind, working hours and so forth. The Commission first laid down the "methodology" in 1982 and revised it in 1988 and 1992.

3. It was in April 1993, i.e. after the revision of 1992, that in the teeth of protest from the staff associations the secretariat of the Commission and UNESCO together began a general survey of conditions in Paris. The staff representatives, who ordinarily took part in such surveys, declined to do so this time on the grounds that the whole point of the revision had been to lower pay at UNESCO by reference to the best prevailing rates of outside pay.

4. Subject to what is said in 14 below there is no objection to receivability. The Tribunal's power of review over the setting of pay has been defined in, for example, Judgments 1000 (in re Clements and others), 1265 (in re Berlioz and others), 1498 (in re Schiffmann and others) and 1499 (in re Berger and others). Thus Judgment 1265 says that the Tribunal will review both the validity of the criteria on which the methodology rests and the Commission's compliance with the methodology.

5. As was said in 1 above, the complainants' prime objection is to what they see as essential features of the methodology: fringe benefits must since 1992 be reckoned according to cost to the employer instead of market value; the sums the outside employers spend on training are overlooked; and bonuses for merit and output no longer count.

6. The fringe benefits that count in any proper assessment of conditions are "tangible non-cash goods and services, usually of a non-social nature, provided by employers". Up to 1992 the usual gauge of such benefits was the market value, i.e. the net gain to the employee. But even before that year the methodology did speak of "quantification of a benefit on the cost to the employer" in some cases, for example where the employer supplied "free or discounted company products". The working paper on the 1988 methodology also said that "recreation facilities, vacation packages, employer-sponsored events" and airline tickets might all be reckoned according to cost to the employer. No doubt, as the complainants contend, the revision of 1992 did result in a reduction of outside employees' fringe benefits. But the change was not as bad as they make out since some such benefits were already being evaluated in terms of cost to the employer. Besides, according to the survey, which covered 17 employers, the goods and services taken into account were such that the effect of the change was slight. So the revision is not to be deemed unlawful on that score: the Commission exercised its discretion to count the cost of all fringe benefits to employers, and there was nothing inherently wrong about that.

7. As for the exclusion of the costs of training, the complainants submit that training is a material component of conditions of service and that the Commission was not free to discount the benefit of such training. In any event - they argue - whatever the methodology followed and despite the Commission's own recommendations, the training UNESCO gives is not enough. On that point UNESCO appears in its reply to acknowledge shortcomings by promising to "look into any possible ways of increasing its training budget"; but the subject obviously has no bearing on the dispute over pay. The complainants' plea that the method of comparison with outside pay should not have disregarded training would carry weight if it had any merit. In fact, whatever place personnel policy may give to training, it is hard to evaluate the benefits of it to staff. Any attempt to do so may end in approximation or error because those benefits are not a reward for services rendered and depend on each staff member's duties, experience and career prospects. Though comparison of such benefits might have proved possible, the methodology did not have to take account of them.

8. In the complainants' submission the revised methodology discounted bonuses for merit and so made for serious distortion. They explain that the effect was to continue a reduction in the figures of outside pay as against pay at UNESCO, where such bonuses are granted in the form of extra step increments. On the evidence, however, the methodology discounted only "performance payments made to individuals that are of an exceptional nature based on the merit or productivity of individuals and would not be paid as

a part of salary". The survey did take account of any salary increments and bonuses, other than "exceptional" ones, paid to outside employees for merit. Both the methodology and the application of it are unimpeachable on that score.

9. The complainants say that UNESCO neglected the provisions of the methodology on housing benefits and on supplementary health insurance.

10. The Commission's survey of 1988 did take account of low-interest housing loans. The one of 1993 did not, on the grounds that but few wage earners got them; indeed few in like jobs managed even to qualify, so tight were the conditions for getting them. Contrary to what the complainants make out, those grounds are not wrong in fact. They are quite in keeping with the material provisions of the methodology, which say that a benefit involving a financial contribution from the employee shall be "quantified and added to salary" only if two conditions are met:

"(a) The benefit must be offered across the board to all employees and under similar conditions;

(b) The benefit must be taken advantage of by the large majority of employees."

The survey did take account of the low-interest loans granted by some employers provided that the employees who got them accounted for over half the staff on the payroll.

11. Although all the employers covered by the survey of 1993 offered supplementary health insurance for staff, the Commission neither gave further information nor compared UNESCO policy nor made any particular recommendation to the Organization. In the complainants' submission it was thereby in breach of the revised methodology, which requires comparison of social benefits and says that, "Where possible and appropriate, however, organizations should attempt to align their practices with the best prevailing outside conditions on a benefit-by-benefit basis". The complainants contend that outside employers ordinarily pay two-thirds of the premiums of supplementary health insurance of their staff, whereas UNESCO staff have to pay the premiums in full; so comparison would have shown that on that score outside staff fare better; and the Commission ought at least to have recommended bringing practice at UNESCO into line with the best conditions prevailing outside.

12. On the evidence the Commission did gather data on health insurance, including supplementary coverage. Though the rules may indeed alter by-and-by, they did not then require the Commission to evaluate and add to pay any benefits that outside employers provided for staff in the form of subsidised health

insurance. Nor was it bound to recommend that UNESCO fall in line with the practice of outside employers, or at least most of them. In respect of compulsory insurance premiums and the refund of expenses incurred, UNESCO's scheme of staff health insurance and the social security system in France are not closely comparable; indeed they are quite different. So matching the best prevailing conditions in Paris is not just a matter of taking into account the better terms on which wage earners outside UNESCO get supplementary insurance. The Commission abided by the applicable methodology - for all its flaws on that count - and UNESCO made no mistake of fact or of law.

13. The complainants plead that the arrangements for making the survey ignored some special features of employment at UNESCO. The choice of UNESCO posts made for poor comparison, and there was further distortion in that most General Service staff are at the top of their grade and so too low a figure was put on outside pay for comparable jobs.

14. UNESCO objects that the complainants' plea about the choice of posts is irreceivable because they did not put it forward in support of their original claim. The objection is mistaken: receivability depends on the making of prior claims, not of prior pleas. Inasmuch as the complainants may challenge pay - and that is not in dispute - they may enter whatever pleas they like, including any they did not make in support of their internal appeal.

15. Though admissible, the plea is devoid of merit. As the complainants point out, the choice of posts in UNESCO to be compared with outside jobs is decisive. But there is no question of having a survey cover every grade and post in an organisation. As the revised methodology puts it, "The effectiveness and reliability of any salary survey are largely determined by the way in which jobs are selected, described and then matched". Here the survey ran to fourteen jobs in six grades and of the main sorts of work. The complainants think that the fourteen were ill-chosen and made for poor comparison with outside jobs; better, say they, to have kept the seven covered in the survey of 1988-89, since UNESCO had not finished the exercise of grading it had started in 1991.

16. Yet the survey was not to be baulked or held up just for want of a new grading of posts. The methodology said that a survey should ordinarily cover fourteen to twenty posts; the survey of 1993 did so; and there is no evidence to suggest either that the chosen posts were untypical of the duties of General Service staff - even though the choice cannot but be somewhat arbitrary - or that UNESCO wanted its choice to foil comparison with outside jobs.

---

17. The complainants argue that the survey ought to have compared jobs at like levels of seniority inside and outside UNESCO and not ignored the inverted "pyramid" of the age structure of UNESCO staff. There is merit in the criticism. Yet to whichever side one may tend on that point, the comparison is fated to go awry. In any event there was nothing unlawful in the approach the survey took. Neither Commission nor Organization went beyond the bounds of the discretion that the case law allow them in assembling data on pay from the full gamut of UNESCO posts and drawing comparison with pay and long-service bonuses of outside wage earners. They thereby complied with the rule in the revised methodology that average pay for staff in each group should be worked out from data on the pay of staff "at their actual step", even if it was beyond the range of steps that had the Commission's blessing.

18. The complainants' last plea is that UNESCO refused to cooperate with the staff representatives and acknowledge their function as such: it would not let them have details of the survey as required. It is of course important to have qualified representatives take part in a process that matters a great deal to the staff, culminating as it does in the setting and review of pay scales. But it was the staff representatives themselves who announced that they would have nothing to do with the survey of 1993. There is a more particular issue as to whether they saw the texts that were used or drafted in or after the survey. But on that score the Tribunal is satisfied that all the information they wanted they got, though not always in good time, and it finds no evidence to bear out their "feeling that there were some documents, which they could not identify, that they never saw".

19. For the foregoing reasons the complainants' claim to the quashing of the impugned decisions must fail. So too do their claims to damages for the breach of Flemming in the pay freeze that followed the survey.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

(Signed)

William Douglas Michel Gentot Egli

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FIRST SESSION

In re LOPEZ LAHESA (Nos. 1 and 2), MARTIN (Nos. 1 and 2), SHACKLEFORD (Nos. 1 and 2) and TEDJINI (Nos. 3 and 4)

Judgment 1520

THE ADMINISTRATIVE TRIBUNAL,

Considering the common complaint filed by Mrs. Maria del Carmen López Lahesa, Mrs. Marie-José Martin, Mr. Peter Shackleford and Mr. Patrice Claude Tedjini - his third - against the World Tourism Organization (WTO) on 5 July 1994 and corrected on 14 February 1995;

Considering the second common complaint against the WTO filed by Mrs. López Lahesa, Mrs. Martin, Mr. Shackleford and Mr. Tedjini - his fourth - against the World Tourism Organization (WTO) on 5 July 1994 and corrected on 14 February 1995;

Considering the letter of 25 July 1995 from the Organization's counsel asking the President of the Tribunal to stay the proceedings on the grounds that the WTO intended to reverse the impugned decisions at a session its general assembly was to hold in October 1995 and the Registrar's reply of 17 November that under Article 14 of the Tribunal's Rules the President granted the Organization until 15 December to reply;

Considering the WTO's replies of 15 December 1995, the complainants' rejoinders of 21 February 1996 and the Organization's surrejoinders of 26 March 1996;

Considering the applications to intervene filed by:

A. Abdel Ghaffar
C. Antón
D. Bernardet
A. Boncy
S. Bouche
J.M. Carballo
F. Casado
A. Corbin
I. Degioanni
R. Deming
M. Diotallevi
J.A. García Blázquez
C. Gayo
V. Giusti
H. Handszuh
A. Huescar
B. Hurley
E. Maccoll
N. di Mambro
I. Medrano

E. Melguizo
O. N'Diaye
L.A. Ontiveros
P. Ortiz
E. Paci
F. Peláez
J. Rodriguez
M. Rodriguez
J. Romero
M. Schwaar
R. Songel
J. Soto
J. Thébaud
M. de la Torre

Considering Articles II, paragraph 5, and VII of the Statute and Article 14 of the Rules of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. By circular NS/403 of 29 December 1993 the Deputy Secretary-General of the WTO informed the staff that new Staff Regulations and Rules would take effect at 1 January 1994.

On 28 January 1994 the complainants sent two letters to the Secretary-General. The first protested against the circular on the grounds that the new rules either did away with or cut their entitlements. They claimed under paragraph 7 of the Rules of the Joint Appeals Committee the withdrawal or amendment of the circular to safeguard their entitlements under the Staff Regulations and Rules in force as at 31 December 1993.

In their other letter they asked the Secretary-General, in accordance with their contracts as at 31 December 1993, to preserve their entitlements under the Regulations and Rules in force at that date.

In his reply of 28 February 1994 the Secretary-General said that their acquired rights would be "maintained and protected by the new Staff Regulations (Regulation 33) and Rules (Rule 32.1)". He described their claims as "at odds with the basic principle of the law of the international civil service that appeal does not lie against general decisions as such".

On 25 March they protested to the Secretary-General under Staff Rule 31.1 and paragraph 10 of the Rules of the Joint Appeals Committee against that rejection of their claims. They applied for leave, if he rejected their claims, to go to the Tribunal without prior appeal to the Committee.

By letters of 19 April 1994 the Secretary-General granted their application for waiver of the internal proceedings.

Their counsel asked the Deputy Secretary-General whether the waiver also applied to their protest of 25 March 1994. The Deputy Secretary-General answered in a letter of 16 May 1994 that the waiver held good "whatever form their claims may take".

B. The complainants have only one plea: breach of acquired rights.

They contend that on many fundamental and other points the new Staff Regulations and Rules are much or rather less favourable than the old ones because they remove or reduce several rights: the right to legal status in line with the common system of the United Nations; the right to end-of-service entitlements in amounts that are again in line with that system; coverage by the United Nations Joint Staff Pension Fund against old age and invalidity; and the right of an established official to six months' notice of dismissal.

Those changes in the terms of appointment are fundamental and essential by the criteria in the case law: their nature, cause and effects.

The first complaint seeks the quashing of the Secretary-General's decision of 19 April 1994 and the grant of full redress in consequence, including the withdrawal or amendment of circular NS/403. The complainants claim costs.

In their other complaint they ask the Tribunal to set aside the decision of 19 April 1994 as interpreted in the Deputy Secretary-General's letter of 16 May to their counsel, and again to grant them full redress and costs.

C. In its replies the Organization expresses surprise at the processing of the complaints. It wonders whether the Tribunal was right or fair in making rulings that overlooked how small it is or that were in breach of adversarial procedure.

Citing the case law, it submits that the complaints are irreceivable and that the Tribunal is not competent to entertain them. The complainants are but a "front" for the Staff Association, which does not as such have access to the Tribunal. And since what they are challenging is a change in the rules, the Tribunal may not entertain their claims anyway. The criteria for receivability in Article VII(1) of the Tribunal's Statute are not met. There is no actual dispute between the Organization and any one of the complainants. The circular merely tells the staff of new provisions in the Staff Regulations and Rules. None of the complainants is challenging any single decision giving effect to the changes in the Rules, though only individual decisions taken thereunder are challengeable.

In subsidiary argument on the merits the WTO says that the complainants have won satisfaction on almost all the points they raise in their complaints. Their legal status is in line with the common system, and the amounts of their end-of-service entitlements are and will continue to be what that system affords. Their old-age and invalidity coverage under the Pension Fund holds good. So in all those respects there is no breach of their "acquired rights".

It was because it knew that that outcome was under study that the Organization applied for a stay of proceedings. The complainants knew that too and probably that is why they did not demur. So the Organization fails to see why the President of the Tribunal ordered the resumption of proceedings that no longer served any purpose.

Perhaps the complainants wanted resumption because one change they object to in the Staff Rules holds good. It is about the former right of an established official to six months' notice of dismissal instead of the three now prescribed in Rule 24.6(a). But the change was just a matter of ensuring consistency and impaired no acquired right.

The WTO asks the Tribunal to disclose any evidence or documents that may shed light on the reasons why the President ordered resumption of the proceedings; to join the complaints; and to declare them irreceivable or, failing that, devoid of merit.

D. The complainants point out in rejoinder that the WTO's case is tantamount to denying the existence of individual decisions. It is mistaken; the WTO did take "individual decisions by its implied final rejection of the claims of each of them to the safeguarding of his or her acquired rights". Consistent precedent refutes its plea that the complaints are irreceivable on the grounds that they had suffered no actual injury by the date of filing their complaints.

They are sorry to see that the Organization has not replied on the merits but just avers that "most of the provisions they were objecting to have been amended as they had wished without ever having been applied". The statement is plainly untrue.

The complainants acknowledge that the issue of participation in the Pension Fund is settled. But the Organization cannot properly say that that was all their case amounted to and that because the issue has disappeared there is no case left to answer.

Terms of employment at the WTO are now in line with the common system. Yet the staff will not necessarily always be entitled to a legal status in line with that system, which is what they had under former Staff Regulation 33: "the amendments are compatible with the common system of salaries, allowances and other conditions of service of the United Nations Organisation and its specialised agencies". Their loss of so essential a safeguard of pay amounts to breach of an acquired right.

As for the rights of an official on dismissal, the WTO says nothing of end-of-service entitlements, and cutting the period of notice from six to three months is anything but a matter of simplification.

E. In its surrejoinders the WTO maintains on the merits that it has not infringed any acquired right. In answer to the complainants' pleas that their legal status is no longer in line with the common system it points out that under Article 3(b) of the Regulations of the Pension Fund compliance with the common system is a *sine qua non* of an organisation's membership of the Fund. By joining the Fund the WTO agreed to align conditions of service with those that apply in the system. That is, moreover, the obvious thrust of its agreement with the Fund, the General Assembly of the United Nations having adopted a resolution allowing it to join.

As for the amounts of end-of-service entitlements, the WTO follows the rules of the common system.

Lastly, the lowering of notice of dismissal from six to three months is a straightforward matter of standardisation, three months being the norm in nearly every organisation in the common system.

Enlarging on its pleas in the reply, the WTO maintains that the complaints are irreceivable.

CONSIDERATIONS:

1. The four complainants, who are officials of the World Tourism Organization, seek the quashing of a decision of 19 April 1994 by its Secretary-General upholding an earlier decision not to amend or withdraw a circular of 29 December 1993. The circular told the staff that the Organization's General Assembly and Executive Council had adopted new Staff

Regulations and Rules which would take effect at 1 January 1994. There are two sets of complaints. One challenges the lawfulness of the new rules and seeks amendment or withdrawal of the circular; the other seeks the preservation of the rights the complainants enjoyed under the rules in force as at 31 December 1993.

2. Since the issues the complaints raise are the same they are joined.

3. The Tribunal will first take up the WTO's application for disclosure of "any evidence or documents that may shed light on the reasons why the President ordered a resumption of the proceedings". All that need be said is that the President was acting by virtue of the authority vested in him by Article 14 of its Rules in setting at 15 December 1995 the time limit for filing the Organization's submissions in reply. The complainants were quite properly granted extensions of the time limit for correction of their complaints as filed. So too was the defendant allowed extensions of the time limit for reply, which was originally 30 March 1995 and finally set at 15 December 1995. Contrary to what the defendant seems to be arguing, there were no grounds for not having the proceedings go ahead. The President did no more than exercise his authority in setting the final deadline.

4. The Organization objects that the first set of complaints is irreceivable on two counts. One is that the complainants are just acting as a front for the Staff Association and fall foul of the precedents that declare complaints by such associations to be irreceivable: see for example Judgment 911 (in re de Padirac No. 2). The complainants have filed complaints in their own name and are quite free to claim rights as officials of the WTO by the means at their disposal.

5. More telling is the Organization's other objection, which it founds on a long line of precedent. It cites Judgment 625 (in re Desmont and Gagliardi), which says:

> "the Tribunal will declare irreceivable a complaint impugning a general decision against which there can be no direct internal appeal, but which must ordinarily be followed by individual decisions against which such appeal does lie."

The rule has been reaffirmed several times, for example in Judgment 1329 (in re Ball and Borghini). But it is to be taken together with what the Tribunal said in Judgment 1000 (in re Clements, Patak and Rodl): an international civil servant may question the lawfulness of any general measure which affords the basis in law for the impugned decision that directly affects him.

6. The general decisions which the Assembly and Executive Council of the WTO took and which came into effect as announced in the circular affect the complainants' right to legal status in line with the common system, particularly as to the amounts of end-of-service entitlements, notice of dismissal and the general rules on retirement pensions. None of those provisions - some of which have indeed been dropped - directly infringes any of the rights that the complainants are asserting. They may, if they so wish, properly challenge any individual decision that applies to the provisions. Insofar as they are challenging the circular their complaints are therefore irreceivable.

7. So is their challenge to the decision refusing their claim to a promise from the Organization to preserve the rights they had under the old Staff Regulations and Rules. Any decisions that may be taken to give effect to the general rules will be challengeable provided that there is some actual dispute for the Tribunal to rule on. Here there is none. The complainants cite no individual decision that causes them injury. They may not contrive such dispute by seeking promises from the Organization. In any such decision they show no cause of action and their complaints are for that reason irreceivable and must fail.

DECISION:

For the above reasons,

The complaints and the applications to intervene are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

(Signed)

William Douglas Michel Gentot Egli

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANIZATION

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FIRST SESSION

In re DIOTALLEVI (No. 4) Judgment 1521
(Application by the WTO for interpretation)

THE ADMINISTRATIVE TRIBUNAL,

Considering the application filed by the World Tourism Organization (WTO) on 12 July 1995 for the interpretation of Judgment 1407;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 7 of its Rules;

Having examined the written submissions;

CONSIDERATIONS:

This complaint is an application by the World Tourism Organization for the interpretation of Judgment 1407 of 1 February 1995. The Tribunal thereby quashed a decision of 28 February 1994 by the Secretary-General of the Organization refusing to restore to the complainant, Miss Marina Diotallevi, the title of "assistant".

On 30 December 1994 the Secretary-General issued a circular, NS/421, about the classification of posts. He wants to know whether "Judgment 1407 prevents the Organization's applying the circular to Miss Diotallevi and to all her colleagues".

Judgment 1407 is quite clear and leaves no room for interpretation about the Tribunal's ruling on the dispute. What the Organization really wants is that the Tribunal say whether the circular is lawful. That being so, its application is clearly irreceivable and must be dismissed under the summary procedure in Article 7 of its Rules.

DECISION:

For the above reasons,

The application is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

(Signed)

William Douglas Michel Gentot Egli

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FIRST SESSION

In re BLUSKE (No. 5)
(Application for execution)

Judgment 1522

THE ADMINISTRATIVE TRIBUNAL,

Considering the application filed by Mr. Guillermo Carlos Bluske on 20 January 1995 and corrected on 26 June for the execution of Judgments 1154, 1242, 1328 and 1362, the reply of 3 October 1995 from the World Intellectual Property Organization (WIPO), the complainant's rejoinder of 26 January 1996 and WIPO's surrejoinder of 1 March 1996;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

CONSIDERATIONS:

1. This application is Mr. Bluske's fifth complaint against the World Intellectual Property Organization. In his submission it has not yet executed the Tribunal's judgments on his case. In particular it has failed to grant him full redress for the Director General's decision of 20 October 1994 not to reinstate him in its employ. He wants it to pay him the one year's salary and allowances that the Tribunal awarded him in Judgment 1242 on his second complaint, the costs awarded in Judgments 1328 and 1362 on his third and fourth complaints, the amounts payable by way of penalty under Judgment 1362, and compound interest on all the sums due.

2. The complainant joined WIPO on 16 June 1989 under an appointment for two years. The Director General declined to renew it and he lodged his first complaint. In Judgment 1154 of 29 January 1992 the Tribunal set the decision aside and ordered the Organization either to reinstate him by extending his appointment or, if that proved impossible, to pay him one year's salary and allowances in damages for all forms of injury he had sustained. It awarded him costs.

3. On 10 February 1992 the Director General decided not to reinstate him but offered to pay him instead 130,156.45 Swiss francs and the award of costs. He lodged his second complaint, which the Tribunal ruled on in Judgment 1242. It set aside the decision against reinstatement on the grounds that the Organization had not done its utmost to find him a job. It sent his case back to the Organization for a new decision and awarded him another year's salary and allowances in damages and further costs.

4. WIPO having failed to discharge the two obligations laid on it by Judgment 1242, the complainant had to come to the Tribunal a third time. Judgment 1328 allowed his claim to the payment of compound interest on the sums not yet paid at the rate of 10 per cent a year as from 24 March 1993. It sent the case back again for the Organization to take at the earliest possible date an express and properly substantiated decision. It again awarded him costs but dismissed his other claims.

5. Still he failed to get either the amounts awarded or an express decision on reinstatement. He filed an application which was his fourth complaint. In Judgment 1362, delivered on 13 July 1994, the Tribunal held that the two consecutive awards of one year's pay afforded him sufficient redress since he had a rightful expectation of renewal for no more than two years. But since WIPO had not discharged its duty to take a proper decision on his claim, the Tribunal ordered it to do so and to pay him 10,000 Swiss francs by way of penalty for each further month of delay. It ordered payment of compound interest on the costs awarded in Judgment 1328 and made a further award of costs for his fourth complaint.

6. That was how things stood until 20 October 1994, when the Director General wrote him two letters. The first set out in great detail the reasons for not reinstating him in any of the posts that had become vacant since the date of Judgment 1154. In the second letter the Director General offered to pay him the amounts awarded - 183,000 Swiss francs and 33,000 French francs - provided that he surrendered the right to file suit with this or any other tribunal. The complainant refused. He contests the Director General's reply to his claim to reinstatement and seeks payment of the sums set out above.

7. WIPO raises several objections to receivability. All fail. As was said in Judgments 1328 and 1362, when in difficulty over the execution of a judgment a complainant is free to come straight to the Tribunal and need not first go through the internal appeal procedure; that would merely prolong a dispute of which the material issues are not in

doubt. WIPO's taking a "new decision" on the case does not warrant its ignoring what is self-evident: the issue is its execution of the earlier judgments. Nor is there any merit in its plea that the form that the complainant filed on 20 January 1995 made no express claim to the quashing of the decision of 20 October 1994 not to reinstate him. He has stated his claims quite plainly, and they include the grant of

> "full redress in law for the failure to execute Judgments 1154 and 1242, as upheld in 1328 and 1362, in particular in the Director General's decision of 20 October 1994 against reinstatement."

That he set out his pleas in a brief entered several months later, after due extension of the time limit granted for the purpose, has no bearing on receivability. As was held in Judgment 1305 (in re Sharapov) under 16 - to which the Tribunal draws the Organization's attention - the Registrar may as such take any action he sees fit to safeguard due process.

8. Though receivable, the application is devoid of merit. Contrary to what the complainant makes out, the Organization has this time discharged its duty to take an express decision duly giving its reasons for not reinstating him. Its decision of 20 October 1994 takes seriatim all the posts he might have been appointed to. It explains the reasons of fact or law why it came to the view that his training, experience or grasp of languages or the need for special skills disqualified him for some posts. The reasons why he was not appointed to others had to do with the budget, some posts being "frozen". Or else the reasons were administrative: for example the Appointment and Promotion Board was not in favour, or the Organization gave priority to a permanent employee. At all events the complainant adduces no specific evidence to suggest any mistake of law or fact in the refusal to reinstate him.

9. As for his claims to payment, the Organization has not withdrawn its offer of 20 October 1994 to pay him another year's salary and allowances, plus compound interest; the sums reckoned by way of penalty for the delay from 12 August to 20 October 1994; interest on the costs awarded in Judgments 1242 and 1328; and the costs awarded in Judgment 1362. Acceptance of that offer, provided that it is made unconditionally, will ensure proper execution of the earlier judgments. If the Organization pays him the sums due within 60 days of the date of delivery of this judgment, the dispute may be treated as at an end. The Tribunal will therefore dismiss his further claims, including the payment of compound interest on the sums due by way of penalty and on the costs awarded under Judgment 1362.

10. Since his other claims fail so does his claim to costs.

DECISION:

For the above reasons,

The application is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

(Signed)

William Douglas Michel Gentot Egli

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANIZATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

EIGHTY-FIRST SESSION

In re MALHOTRA (Kashmiri Lal) No. 4 Judgment 1523
(Application for execution)

THE ADMINISTRATIVE TRIBUNAL,

Considering the application filed by Mr. Kashmiri Lal Malhotra on 8 September 1995 for the execution of Judgment 1434, the reply of 19 December 1995 from the World Health Organization (WHO), the complainant's rejoinder of 16 January 1996 and the WHO's surrejoinder of 26 April 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written evidence;

CONSIDERATIONS:

1. This is an application for execution of Judgment 1434, which the Tribunal delivered on 6 July 1995 and in which it made the following orders:

"1. The Director-General's decision of 28 February 1994 is quashed.

2. The case is sent back to the Organization so that the regional Board of Appeal and, if need be, the headquarters Board may take up the complainant's appeal anew.

3. The Organization shall make available to the boards of appeal the full records of the selection committee's proceedings for the purpose of appeal.

4. It shall pay the complainant 3,000 United States dollars in moral damages.

5. It shall pay him 200 dollars in costs.

6. His other claims are dismissed."

2. By 8 September 1995, when the complainant filed this application, he had received the amounts awarded under points 4 and 5. The Organization does not, however, dispute that it had not complied with the order in point 2, although on 7 and 29 August the complainant had sent reminders to its Regional Office for South East Asia asking for referral of his case to the regional Board of Appeal.

3. On 12 October 1995 the regional Board informed the complainant that the Regional Office had asked it to reopen his case and that it would do so "soon after all the documentation is received". The same day the secretary of the Board sent a message asking the chairman of the headquarters Board and the Division of Personnel at headquarters to supply copies of the headquarters Board's report, Judgment 1435 and "any other documentation" that the headquarters Board had "used".

4. The Organization explains that any delay in returning the case to the regional Board of Appeal was due solely to doubt as to whether instructions were necessary for that purpose. It is clear that the secretary of the regional Board was unsure who was to send the case back because he addressed his message of 12 October 1995 to both the headquarters Board and the Division of Personnel at headquarters.

5. In Judgment 1435 the Tribunal entertained the complainant's application for execution of a judgment, similar to Judgment 1434, in which it had directed that the case be sent back to the Organization to enable the regional Board and, if need be, the headquarters Board to take up the complainant's appeal anew. Judgment 1435 ruled under 13: "The complainant was justified in applying to the Tribunal after the lapse of two months for execution of the judgment".

6. This case cannot be distinguished. There could be no doubt about who was to return the case: the judgment gave directions to the defendant Organization, which was responsible for execution.

7. The Organization informs the Tribunal in its reply that the case "has already been returned to the regional Board of Appeal". Though the complainant does not contest that, he claims compensation for "moral prejudice and mental torture" attributable to the failure to execute Judgment 1434 promptly. He suggests that the delay in sending his case back was deliberate and calculated to harass him and cause him further "mental torture". There is nothing in the evidence to support that suggestion. Although the Tribunal will make no award of damages for the delay in sending the case back, the complainant is entitled to costs because he had to come to the Tribunal to apply for execution.

DECISION:

For the above reasons,

1. The application is dismissed.
2. The Organization shall pay the complainant 200 United States dollars in costs.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Julio Barberis, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

Wm Douglas
William Douglas

Mella Carroll
Mella Carroll

Julio Barberis

A.B. Gardner
A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

EIGHTY-FIRST SESSION

In re RAJAGOPAL

Judgment 1524

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Krishnamurthy Rajagopal against the Food and Agriculture Organization of the United Nations (FAO) on 25 August 1995, the FAO's reply of 15 December 1995, the complainant's rejoinder of 19 January 1996 and the Organization's surrejoinder of 16 April 1996;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Indian born in 1956, joined the staff of the FAO in 1983 as an accounting clerk under a fixed-term appointment at grade G.4. He was assigned to the Organization's Programme for the Bay of Bengal at Madras. The FAO promoted him to G.5 in 1985 and to G.6 in 1991.

By a memorandum of 5 October 1992 the Director of the Programme told him that reductions in activities had made his post unnecessary and his contract would not be extended after it expired on 31 January 1993.

By a memorandum dated 23 December he appealed to the Director-General against what he described as "notice of termination".

The FAO having granted him sick leave until 11 April 1993, his formal separation took place after the medical officer declared him fit on 27 April 1993.

By a letter of 10 May 1993 the Assistant Director-General in charge of the Administration and Finance Department rejected his appeal of 23 December 1992 on the Director-General's behalf and referred him to the rules on appeal to the Appeals Committee.

In a letter of 3 November 1993 he submitted a claim to a senior personnel officer in Rome for payment of termination indemnity. By a reply dated 11 November the officer informed him that staff members whose fixed-term appointments expired at the scheduled date were not entitled to the indemnity.

In a letter of 1 December 1993 he asked the Director-General to review the decision. The Director of the Personnel Division confirmed in a letter of 17 January 1994 that termination indemnity was not payable upon expiry of a fixed-term appointment.

By a memorandum of 10 March 1994 he appealed to the Appeals Committee. In its report of 30 March 1995 the Committee recommended rejecting his appeal on the merits.

In a letter of 15 June 1995, which he impugns, the Director-General endorsed that recommendation.

B. The complainant submits that he has a "legitimate entitlement" to termination indemnity under the rules on termination for abolition of post. He says the FAO resorted to termination as a retaliatory measure after he denounced mismanagement in the Programme. He cites the case of another FAO official who was also terminated on grounds of abolition of post and who did get the indemnity, and he contends that he was discriminated against.

He seeks payment of termination indemnity plus interest at 24 per cent a year from the date of separation and damages for loss of "career prospects" and "severe stress". He also claims 1,000 United States dollars in costs.

C. In its reply the FAO observes that it did not terminate the complainant's appointment. For lack of funds it was unable to extend his appointment, but for the period of sick leave, beyond the contractual date of expiry. It did not discriminate against him: the official he mentions was not in like case since his appointment was terminated upon the abolition of his post, whereas the complainant's was not.

D. In his rejoinder the complainant disputes elements in the FAO's reply and presses his claims. There was, in his submission, no difference between his case and the other official's: both came down to abolition of post.

E. In its surrejoinder the Organization comments on pleas in the rejoinder and returns to the arguments it put forward in the reply.

CONSIDERATIONS:

1. The complainant joined the FAO in 1983 as an accounting clerk. He was assigned to its Programme for the Bay of Bengal and stationed at Madras. A memorandum of 5 October 1992 from the Director of the Programme informed him that his fixed-term contract would not be extended beyond the date of its expiry, 31 January 1993. The FAO later granted him sick leave until 11 April 1993, and, with the medical officer's approval, he left the Organization's service on 27 April 1993.

2. On 23 December 1992 he had appealed to the Director-General against what he described as "notice of termination" of his contract. A letter of 10 May 1993 from the Assistant Director-General in charge of the Administration and Finance Department conveyed to him the Director-General's rejection of his appeal, but observed that he had had his contract extended to cover the period of his sick leave. He took no further steps to challenge the decision not to renew his contract.

3. In a letter of 3 November to a senior personnel officer he claimed entitlement to termination indemnity. That officer refused his claim on 11 November. In reply to his letter of 1 December 1993 to the Director-General requesting review of the decision, the Director of the Personnel Division confirmed on 17 January 1994 that no termination indemnity was payable upon expiry of a fixed-term appointment. He lodged an internal appeal on 10 March 1994. In a report of 30 March 1995 the Appeals Committee recommended rejecting it and on 15 June 1995 the Director-General did so. He is claiming payment of termination indemnity under Staff Regulations 301.151 and 301.152, together with other relief.

4. His first plea is that he had to leave because of abolition of his post, not, as the Organization maintains, the expiry of his contract.

5. One clause in his contract provided for termination by either party upon written notice of 30 days. A termination indemnity would then be paid in accordance with Regulation 301.093, which makes payment of the indemnity conditional on the Director-General's terminating the appointment. Regulation 301.151, which the complainant cites, applies to staff whose appointments are terminated for abolition of post, and Regulation 301.152 provides for payment of a larger indemnity in certain circumstances. Lastly, Regulation 301.157 states:

"No termination indemnity shall be paid to:

...

301.1572 a staff member whose fixed-term appointment is completed on the expiration date ..."

6. The Staff Regulations on which the complainant is relying relate to the termination of appointment before the date of expiry. His own situation falls within the ambit of Regulation 301.157, which excludes entitlement to the indemnity.

7. His second plea is breach of equal treatment, and he cites the case of another staff member who did get the termination indemnity. But that case differs from his own in that the other staff member's contract had been terminated prematurely, i.e. before the date of expiry.

8. The conclusion is that his claims to payment of the termination indemnity and interest must fail.

9. Lastly, his claim to an award of damages for loss of career fails because, as was said in 2 above, he did not pursue his challenge to the decision not to extend his appointment and he has therefore failed to exhaust the internal means of redress, as Article VII(1) of the Tribunal's Statute requires.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

Wm Douglas
William Douglas

Mella Carroll
Mella Carroll

Mark Fernando

A.B. Gardner
A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FIRST SESSION

In re BARDI CEVALLOS Judgment 1525

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Hugo Bardi Cevallos against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 8 November 1995 and corrected on 10 November, UNESCO's reply of 11 December 1995, the complainant's rejoinder of 15 January 1996 and the Organization's surrejoinder of 12 February 1996;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a citizen of El Salvador who was born on 19 August 1937, joined UNESCO in January 1981 as Deputy Chief of the Buildings Division in the Bureau of General Services (GES/BM), at grade P.4.

The Organization put his post "in reserve" in January 1986 as part of an exercise of staff retrenchment prompted by the withdrawal of some countries from membership of the Organization. On 1 May 1986 it transferred the complainant to a temporary post financed from the Headquarters Utilization Fund. On 1 March 1988 it again transferred him, to post GES-951, which it financed from the same Fund and created for the purpose of redeploying him.

In April 1990 he alleged irregularities in the management of the maintenance contracts under his supervision: two firms, he said, had failed to work the full number of hours they had been paid for.

The Organization abolished his post and on 1 December 1990 assigned him to a post of administrative officer in the Bureau for Coordination of Operational Activities, which is now known as the Bureau for Relations with Extra-Budgetary Funding Sources (BER). That post too - BER-951 - it financed from the Headquarters Utilization Fund. To pay for building maintenance work from the Fund it adopted a policy of cutting staff costs. That is how it came to abolish post BER-951 at 31 December 1993.

The Senior Personnel Advisory Board (SPAB) was asked to look into the complainant's case. It met on 15 February 1994. It found that the Organization had not done its utmost to find him another suitable post and asked the Bureau of Personnel (PER) for a full list of vacancies. The Bureau failed to do so and after two further meetings the Board therefore held over review of the case.

As from 1 January 1994 UNESCO granted the complainant extensions of his appointment every three months. By a memorandum of 29 July the Director of the Bureau of Personnel told him that his appointment would end at 30 September 1994 and offered him agreed termination including a 50 per cent increase in the amount of the termination indemnity, which the rules allow. In return he was to surrender any further claim against the Organization. He declined in a memorandum of 4 August and on the same day wrote to the Director-General protesting against the decision not to renew his contract after 30 September 1994.

He had a talk with a personnel officer. The Director of Personnel then told him in a memorandum of 30 September 1994 that his appointment would be extended to 31 December 1994; that he was being given the required three months' notice; and the offer of agreed termination held good.

In a memorandum of 28 October to the Director-General the complainant protested against the decision not to renew his contract beyond 31 December 1994. Having got no reply, he appealed on 2 December against that decision to the Appeals Board. In its report of 27 June 1995 the Board recommended reversing the decision and renewing the complainant's appointment as from 1 January 1995. But the Director-General confirmed his decision by a letter of 22 September 1995, the decision the complainant is impugning.

B. The complainant submits that the Organization showed prejudice against him. Shortly after he brought to light the irregularities in managing the maintenance contracts under his supervision, the Administration abolished his post for the sole purpose, he believes, of ending his appointment. It would not even look into his charges. His second-level supervisor, the

Director of the Bureau of General Services, had already tried in June 1990 to get rid of him by proposing an extension of only two months. The offer of agreed termination in return for waiver of his right of appeal was an attempt to cover up misuse of authority.

UNESCO failed to do its utmost to redeploy him and did not associate him in any attempt to do so.

Lastly, there was breach of due process. The SPAB was prevented from doing its job properly: it held his case over three times for lack of information and in the end was unable to report. Though precedent says that when an advisory body makes no recommendation it is for the Director-General to take the final decision, it does not apply to his case.

He asks the Tribunal to set aside the impugned decision, order his reinstatement as from 1 January 1995 and renewal of his appointment up to 19 August 1997 when he reaches the age of 60, and award him 2,000 United States dollars in moral damages and 15,000 French francs in costs.

C. UNESCO submits that the reasons why it decided not to renew the complainant's appointment were objective. His old post, GES-951, was abolished in an operation to reduce posts at headquarters. The reason why he said no more of irregularities over maintenance contracts was that they had been set right. Besides, UNESCO's auditor found no such irregularities. The complainant did not at the time object to the abolition of his post or his transfer and it is now too late for him to do so. The Director of the Bureau of General Services proposed a two-month extension of his appointment pending the outcome of a review by the Director-General of the Organization's general situation.

Citing several posts it considered him for, UNESCO asserts that it did do its utmost to find him another job but found none to suit a civil engineer.

As to the procedure of termination the SPAB was acting ultra vires and the precedent the complainant cites does apply. Though a fixed-term appointment may be terminated without notice or payment of indemnity, the Director-General saw fit to offer him a termination indemnity; besides, Regulation 9.1.2, which is about separation from service, bars protest against termination.

D. The complainant rejoins that he had no cause of action until he learned of non-renewal; so he is not out of time. He does see a link between his disclosure of irregularities over the contracts and the abolition of his post. There is no merit in the argument that the auditor found no irregularities: it is not the auditor's job to ascertain whether contracts are properly executed. The Administration made no adequate effort to redeploy him and the termination procedure was flawed. The Director-General tried to "buy" his silence.

E. UNESCO maintains in its surrejoinder that the complainant's supervisors had no reason to punish him and that the Organization decided to transfer him for objective reasons and as part of general restructuring. Post BER-951 was originally funded from extra-budgetary resources and was then abolished for financial reasons. The complainant is out of time for challenging those measures. Had there been any disparity between the obligations laid down in the maintenance contracts and the bills sent in, the auditor would have reported it. The Organization did make every effort to find the complainant a suitable post and even extended his appointment until 31 December 1994 in the hope of keeping him on. There was nothing wrong with the termination procedure.

CONSIDERATIONS:

1. The complainant's first plea is that the abolition of the post - GES-951 - which he held in December 1990 was unlawful: he invites the Tribunal so to hold.

Not having been challenged at the time, the decision has become final: whether it is lawful is no longer an open question. Nor did it form the subject of the internal appeal that the complainant lodged and that has led to this complaint. So in any event he has failed to meet the requirement in Article VII(1) of the Tribunal's Statute that he first exhaust the internal remedies. His plea is therefore irreceivable, though he may still rely on the facts that form the background to the decision he is impugning.

UNESCO purports to make claims which are but pleas and which the Tribunal need not entertain, counterclaims not being receivable.

2. The complainant is challenging a decision by the Director-General not to renew his fixed-term appointment.

Consistent precedent has it that, like the abolition of a post, such a decision is discretionary. It may therefore be set aside only if it was taken without authority, or in breach of a rule of form or of procedure, or was based on a mistake of fact or of law, or if some essential fact was overlooked, or if clearly mistaken conclusions were drawn from the facts, or if there was abuse of authority: see for example Judgment 1492 (in re Perkins) and the others cited therein.

Though aware of those restrictions on the Tribunal's power of review, the complainant submits that the impugned decision shows misuse of authority, on the grounds that its purpose was not to serve the Organization's interests, and grave breach of due process.

Since the latter plea succeeds there is no need to take up the first.

3. According to Staff Rule 104.1(b)(x) the Senior Personnel Advisory Board (SPAB) advises the Director-General on the "non-renewal of appointments after five or more years of service in the Organization".

Rule 104.1(n) reads as follows:

> "The report of each Board shall contain the recommendation or recommendations formulated by the Board and a brief account of the reasons of each recommendation. Minority votes and dissenting opinions shall be recorded in the report, should one or more members so wish. The report shall be signed by the chairman and the members of the Board."

Rule 104.1(o) requires the Director-General to establish rules of procedure for the boards.

The Rules of Procedure of Personnel Advisory Boards - the version dated 20 November 1967 being the one in force at the material time - contain the following provisions:

> "5. A Board may if it deems necessary interview the persons whose cases it is considering, and other staff members whom it considers to be in a position to furnish relevant information.
>
> ...
>
> 10. When a Board decides that adequate discussion has taken place, the Chairman shall declare the discussion closed: non-members present, other than the Secretary, shall withdraw while the Board deliberates.
>
> 11. The Secretary shall draw up a report of each meeting, setting out the Board's conclusions and, where necessary, the reasons therefor. This report shall be signed by the Chairman and countersigned by the members. It shall indicate, inter alia,

> (a) whether a conclusion has been reached unanimously or by majority vote;
>
> (b) any dissenting opinion which the member concerned wishes to have recorded.
>
> ...
>
> 13. The advice and recommendations of each Board to the Director-General shall be constituted by the signed report of the proceedings, which shall be transmitted by the Chairman of the Board concerned to the Director of the Bureau of Personnel. The Director-General may, before taking a decision on the matter on which a Board has given him advice, refer it back for further consideration to a Board composed as far as practicable of the same members."

It is common ground that those are the material provisions.

According to the minutes the SPAB took up the complainant's case three times. On 15 February 1994 it found that the Organization had failed to do its utmost to redeploy him and asked the Bureau of Personnel for a list of vacancies at headquarters and in the field to see whether he could be offered one of them. On 5 April it adjourned the case for want of information from the Administration. On 14 June it concluded that it had not received enough information to determine whether all reasonable efforts to redeploy him had been made; it regretted in particular that no one in the Bureau of Personnel had been able to give any information on involvement of the complainant in attempts to redeploy him; and it formally suspended his case. The Director-General then took a decision in the absence of the recommendation he had asked the Board to make.

It is clear from the foregoing that the Board did not refuse to make a recommendation: it merely suspended proceedings until it could do so.

UNESCO contends that according to the case law - it cites Judgments 969 (in re Navarro) and 1289 (in re Enamoneta) - the Director-General was free to act in the absence of a recommendation because the advisory body failed to make one and that in any event the Board was acting ultra vires.

The Organization misreads the judgments it is relying on. Judgment 969 was about a case of dismissal for serious misconduct. The Board of Appeal, which was required to make a recommendation, reported the views of its members and the Tribunal held - in 21 - that that report had sufficed to enable the Director-General to reach a decision once he had taken it "into account". Judgment 1289 was about another case against

UNESCO and the report of a senior personnel advisory board. The Tribunal held, in 6, that the Board's report included "advice" under the heading "Recommendation" and that the advice had been "a final, not a provisional, point of view". So in both cases the advisory body had in fact made final recommendations, whereas in this case the SPAB suspended the proceedings in order to get further information from the Administration, rather than report without it.

UNESCO is further mistaken in contending that the Board was acting ultra vires: indeed the Organization does not even seek to show in what way that might be so. The rules quoted above plainly require the Board to review the material issues properly. So it is hard to see how it was ultra vires for the Board to ask about means of redeploying him or how far he had been involved in attempts to sort out his case.

Having failed to await the outcome of the Board's review of the case, the Director-General acted prematurely. Consulting such a board is no idle formality: it is supposed to afford a means of working out a fair solution. In this case it offered the hope of redeploying someone with a long record of service. Several judgments have stressed the importance of advisory boards: see for example Judgment 352 (in re Peeters No. 2) under 5. Judgment 232 (in re Díaz) said that the senior personnel advisory board at UNESCO "was free to determine whether it had enough information at its disposal and whether or not in establishing the truth it would serve any purpose to hear witnesses". Again, in Judgment 1298 (in re Ahmad No. 2) on a related matter the Tribunal held that the Organization was in grave breach of a rule of procedure by failing to ask for the performance report that the Staff Rules required before deciding whether to renew a contract, such a report being - see under 10 - "all the more necessary when the intention is not to renew".

Because of the breach of due process the impugned decision cannot stand, there being no need to go into the merits.

4. For want of a valid decision to terminate his appointment, the contract between the complainant and the Organization is still in force and he is entitled to payment of salary and allowances as from the purported date of termination. UNESCO must also decide whether to reinstate him. In view of his seniority his appointment would not have been bound to end if due process had been observed. In deciding whether or not to renew his contract the Organization must comply with any procedural and substantive rules that are material.

The breach of due process caused him moral injury that warrants redress. But he has sufficient redress in the award of full pay from the date of his departure without having had to provide any services in return: see, on that issue, Judgments 1371 (in re Ortiz) and 1447 (in re Berg); on reinstatement after wrongful termination, Judgments 1317 (in re Amira) under 38; 1323 (in re Morris No. 2); 1342 (in re Baliga); 1350 (in re Blinder); 1351 (in re Li); 1298 and 1361 (in re Ahmad Nos. 2 and 4); 1362 (in re Bluske); 1376 (in re Mussnig); 1384 (in re Wadie); 1386 (in re Bréban) and 1395 (in re Walter).

5. Having succeeded in the main, the complainant is entitled to costs in the amount he claims, which does not seem unreasonable.

DECISION:

For the above reasons,

1. The Director-General's decision of 22 September 1995 is set aside.
2. The complainant is referred back to UNESCO for reconsideration of his right to renewal of appointment.
3. The Organization shall pay him salary, allowances and any other benefits due as from 1 January 1995 until the Director-General takes the decision required in 2 above.
4. It shall pay him 15,000 French francs in costs.
5. His other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

(Signed)

William Douglas Michel Gentot Egli

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FIRST SESSION

In re BAIGRIE

Judgment 1526

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Miss Bernadette Joan Baigrie against the World Health Organization (WHO) on 6 July 1995 and corrected on 17 August, the WHO's reply of 21 November 1995, the complainant's rejoinder on 26 February 1996 and the Organization's surrejoinder of 30 April 1996;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal,

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant held a permanent appointment with the World Intellectual Property Organization (WIPO) when, in 1985, she applied for transfer to the WHO under an inter-organisation agreement. On 1 August 1986 she was transferred to the WHO on a two-year appointment at grade G.5 as a secretary in the Division of Information Systems Support (ISS).

The Organization extended her appointment by two years on 1 August 1988 and by five on 1 August 1990. At 1 December 1990 she was put on a new post at grade G.6 as a technical assistant in the Organization's Global Programme on AIDS (GPA).

In March 1995 the WHO offered to extend her contract, which was due to expire on 31 July 1995, by five months, the reason for the shorter extension being the abolition of the Programme and her post. On 22 March she accepted the offer but said she did so "without prejudice to my rights as set out in my letter of today to the Director-General". In that letter she protested against the decision to extend her appointment by only five months. On the same day she gave the Board of Appeal notice of her intent to appeal.

On 27 March the secretary of the Board told her that her appeal was incomplete since the offer to extend her appointment was not a decision within the meaning of Staff Rule 1230.8.1; only notice of extension on a "personnel action" form constituted such a decision. The WHO confirmed its offer in such a form dated 7 April 1995. By a letter of 10 May she told the Director-General she had given the Board notice, also on 7 April, of her intention to appeal against the decision in the form and asked him to treat it as a final decision under Rule 1240.2 so that she might go straight to the Tribunal. By a letter of 28 June 1995, which she impugns, the secretary of the Board told her that the Director-General had given her leave to go to the Tribunal. In a letter of 2 January 1996 the Administration offered to extend her appointment by six months. She accepted but described her acceptance "Without prejudice to my rights as set out, *mutatis mutandis*, in my letter of 20 [*recte* 22] March 1995 to the Director-General".

B. The complainant accuses the WHO of bad faith. It misled her about the nature of the post she had had with the GPA since 1 December 1990: only in March 1995 did she learn that it was of limited duration. Contrary to the Organization's consistent practice, neither the notice of vacancy nor the description of the post revealed that the duration was limited. What is more, the post was treated from the outset as a permanent one, as is plain from the text headed "Notification of decision on position request" and provided by the Budget Division in 1989. Had she known the post was one of limited duration she would never have applied for it.

The WHO ignored her rightful expectations. The case law of international administrative tribunals says that an organisation which so treats an employee as to arouse his hopes has a duty to fulfil them. Having had her appointment extended by two years and then by five, she was entitled to another five years, not five months, especially since the appraisals of her performance had been consistently good.

She seeks the quashing of the impugned decision, the grant of a permanent appointment or at least a five-year extension, moral damages and costs.

C. In its reply the WHO denies misleading her into thinking her post was a permanent one. It had no "consistent practice" of indicating the duration of appointment in notices of vacancy or post descriptions. She would certainly have applied for the post even if she had known its duration was limited because the appointment carried promotion to G.6. What is more, in 1990 the WHO was expecting the Programme to grow because the disease was spreading. Whether or not a post is of fixed-term duration has nothing to do with the nature of the appointment. A post of indefinite duration offers advantages only in the context of the reduction-in-force procedure and as to end-of-service entitlements.

The WHO has not frustrated her legitimate expectations: she has no right, be it under the Staff Rules, the terms of her appointment or the case law, to a five-year extension or to a permanent appointment. The length of an extension of appointment and the grant of a permanent appointment are at the Director-General's discretion, and the Tribunal's power of review over such matters is limited. The only reason why she got a five-month extension was the impending demise of the GPA, at 31 December 1995.

D. In her rejoinder the complainant observes that the WHO has shirked its duty under Manual paragraph II.9.260 to make it clear in vacancy notices and post descriptions that posts are of limited duration. Making out that the GPA was a long-term programme with prospects of growth confirms her view that her post with the Programme was one of indefinite duration. She never said that the nature of the post determined the nature of the appointment. But someone who is on a post of indefinite duration has a better chance of extension than does the holder of a post of limited duration, since he is entitled to the reduction-in-force procedure in the event of abolition.

E. In its surrejoinder the WHO presses its pleas. It denies that someone on a post of indefinite duration is more likely to get an extension than someone on a post of limited duration. At the material time, the practice was not to give the duration of the post in the notice of vacancy or in the description. Some of its programmes, even older and major ones, consist mainly of posts of limited duration. The challenged decision was not arbitrary but rests on Manual paragraph II.5.540, which says that an appointment may be extended on several conditions, one being "the availability of funds".

CONSIDERATIONS:

1. The Director-General having waived, in accordance with Staff Rule 1240.2, the complainant's obligation to go through the internal appeal procedure, she has exhausted the remedies open to her within the Organization, as Article VII(1) of the Tribunal's Statute required her to do.

2. Her first objection is that the WHO failed to tell her that the post she applied for in August 1990 and was appointed to as from 1 December 1990 was one of limited

duration. It thus made her more vulnerable - she says - to termination. The Organization stated the duration of other posts it put up for competition; but only in March 1995 did she find out what sort of post she had. Had she known in time she would never have applied. The grant of a permanent appointment would, she contends, afford her redress.

The WHO replies that at the material time its practice was not to tell candidates officially whether the post was of limited or indefinite duration but that the issue has no bearing on the nature of the appointment. Here, it says, the duration of the post did not matter to her because at the time the appointment promised her interesting work at a grade she wanted and the Programme seemed unlikely to end soon since AIDS was spreading and the campaign against it growing.

Good faith must govern relations between administration and official, as the Tribunal declared in Judgment 1479 (in re Gill No. 2) under 12. It requires each party to a contract to let the other have beforehand any material information on points that may reasonably be seen as decisive. Whether a post is of limited or unlimited duration need not be a matter of indifference to the candidate since the duration may affect stability of employment.

The Tribunal is not satisfied, however, and indeed doubts that the want of information influenced the complainant one way or the other. Since she never asked at the time the matter seems not to have troubled her. She left a permanent job with the World Intellectual Property Organization for a fixed-term appointment at the WHO, and so she showed that the prospects of advancement meant more to her than security of employment. And presumably she felt the same when she applied for the job with the Global Programme on AIDS. Since the campaign against the disease was already one of the main issues of health policy, the end of the GPA was hardly in the offing. So there are sound reasons for supposing that even if she had known about the duration of the post she would still have applied for it. At all events she knew full well from the very terms of her contracts what sort of appointments she was to have. The WHO did not mislead her on that score: in particular she knew they were limited in time.

Her plea fails.

3. She pleads that the WHO ignored her rightful expectations of extension. A long record of good performance - she argues - gives rise to reasonable hopes of continued employment, and an organisation must not disappoint them when the time comes to renew the contract.

The decision under challenge was not to renew her fixed-term appointment, and though the complainant had already been granted an extension, it is of course the rules on non-renewal that apply.

According to Staff Rule 1040 a fixed-term appointment carries no entitlement to renewal. According to a strong line of precedent, a decision not to renew it, being discretionary, may be set aside only if it was taken without authority, or in breach of a rule of form or of procedure, or was based on a mistake of fact or of law, or if some essential fact was overlooked, or if clearly mistaken conclusions were drawn from the facts, or if there was abuse of authority. See for example Judgment 1052 (in re James) under 4.

The WHO observed the formal rules on non-renewal: there is no dispute on that score.

The material decision was taken in the Organization's interests. The discontinuance of the GPA entailed abolishing the posts that came under it. Keeping on those who had been on the posts meant finding them jobs elsewhere in the WHO so far as its budget allowed. And it says it had no other post to offer the complainant.

An organisation owes its staff a general duty of care, and must not cause them undue hardship. A case of non-renewal is no exception. The duty may entail avoidance or reduction of injury that termination may cause - see for example Judgments 675 (in re Pérez del Castillo), under 11; 1317 (in re Amira) under 30; and 1450 (in re Kock), under 23 - at least when it was not a short-term appointment, when the record of service was long, and when the official had reasonable expectations of making a career in the organisation.

The WHO does not demur but says it did its utmost to help the complainant. It told everyone who was affected as soon as it could. It extended her appointment by five months, to 31 December 1995, and then found it had no suitable post to offer her. There being no evidence to the contrary, the Tribunal is satisfied that the Organization's account is true. Besides, despite the challenged decision it managed to fund another six-month extension of her appointment under the United Nations Programme on AIDS.

The conclusion is that it was not in breach of its obligations and did not misuse the discretion it has according to the case law. The complainant's second plea fails too.

4. Since her main claims fail so do her claims to moral damages and to costs.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

(Signed)

William Douglas Michel Gentot Egli

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

EIGHTY-FIRST SESSION

In re SAUNDERS (No. 15) Judgment 1527

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifteenth complaint filed by Mr. Yann Harris Saunders against the International Telecommunication Union (ITU) on 9 March 1995;

Considering the interlocutory order in Judgment 1468 of 1 February 1996;

Considering Mrs. Patricia Faccin's letter of 23 February 1996 to the Registrar of the Tribunal, the complainant's observations of 8 March and the Union's final comments of 2 April 1996;

Considering that the submissions may be summed up as follows:

A. Mrs. Patricia Faccin, apart from observing that the duties she performs are those "assigned" to her, says she has no comments to make on the complaint.

B. The complainant observes that Mrs. Faccin does not say whether her post is the same as the one Mr. A. Maggio held as former head of the Fellowships Service. On the strength of the descriptions the two posts are, he submits, "essentially the same".

C. The ITU points out that Mr. Maggio had to manage the entire Fellowships Programme, whereas Mrs. Faccin's duties are of "a more administrative and coordinating nature than a managerial one".

CONSIDERATIONS:

1. The facts relating to this complaint are set out in Judgment 1468.

2. Mrs. Patricia Faccin, the complainant and the Union have made the submissions that the Tribunal invited in that judgment.

3. Mrs. Faccin has merely stated that she continues to carry out the tasks assigned to her by her supervisors and has no further comment to make.

4. The Union has submitted descriptions of the post that Mr. Maggio used to hold - BS3T/P3/421 - and of the one now held by Mrs. Faccin - BS3T/P3/422. It explains that Mr. Maggio, who retired in 1992, was responsible at the Union's headquarters in Geneva for organising and supervising the Fellowships Service and managing the Fellowships Programme as a whole. After he had gone the management of the Programme was "decentralised" and made over to the Union's regional field offices and to the regional units of the Telecommunication Development Bureau at headquarters, and his post, No. 421, was used to serve "other administrative purposes, which are not at all linked to the Fellowships Service". Mrs. Faccin's original grade G.7 post was reclassified and became post No. 422. Because of "restructuring" and "decentralisation" the number of posts in the Service was reduced from five to three, and two at G.7 were "eliminated".

5. The evidence is that upon the conclusion of the whole exercise the Service still needed a head. The descriptions of the two posts, 421 and 422, show that their essential functions were similar. The real upshot of the restructuring and reclassification was, not the upgrading of the post of administrative assistant with the addition of some duties of the head of the Service, but the re-establishment of Mr. Maggio's old post, albeit with a few changes in functions. That being so, the Union ought to have followed the procedure laid down in Service Order No. 111(Rev.2) of 1 July 1981, on the classification of posts, and in particular sections 1.1.2 ("Changes recommended in duties, responsibilities or qualifications required") and 1.1.3 ("Vacancy notice procedure").

6. Whether or not the old post had been abolished, the position in February 1994 was that the P.3 post for head of the Service was vacant. Regulation 4.8 c) of the ITU Staff Regulations and Staff Rules reads:

> "Selection for posts in grades P.1 and above and for posts of a technical character at the Headquarters in grades G.7, G.6 and G.5 shall be made on a competitive basis; vacancies shall be advertised to the Administrations of all the Members of the Union, to the United Nations and other specialized agencies and to the staff of the Union, indicating in detail the nature of the post to be filled, the qualifications required and the terms of appointment."

The post should therefore have been properly advertised and a selection made by competition. Even though Mrs. Faccin had been performing the duties for about a year on her own G.7 post of administrative assistant, she could have been appointed to the vacant post only after the prescribed procedure had been followed. The ITU was not free to by pass the procedure by promoting her to P.3.

7. The Union lightly dismisses the complainant's chances of being appointed to the vacancy, had it been advertised, as "so far-fetched that it remains in the domain of pure hypothesis and ... not worthy of being taken seriously in any respect". Yet he had performed functions comparable to Mrs. Faccin's as early as 1975 and been promoted to grade P.2 in 1986, whereas in 1994 Mrs. Faccin was still at grade G.7. And there is no suggestion that he was not qualified to apply for the post. The appointment directly affected him and he is entitled to challenge it.

8. The conclusion is that the appointment of Mrs. Faccin as head of the Fellowships Service by promotion to grade P.3 was in breach of Regulation 4.8 c), which is quoted in 6 above, and Regulation 4.9, which is about the procedure before the Appointment and Promotion Board. In view of the circumstances in which her appointment and promotion came about they are not severable and must both be quashed.

DECISION:

For the above reasons,

1. The appointment and promotion of Mrs. Faccin to the post of head of the Fellowships Service are quashed.

2. The Union shall fill the post in accordance with Regulations 4.8 and 4.9.

3. It shall pay the complainant 4,000 Swiss francs in moral damages.

4. It shall pay him 1,000 Swiss francs in costs.

5. His other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

Wm Douglas
William Douglas

Mella Carroll
Mella Carroll

Mark Fernando

A.B. Gardner
A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

EIGHTY-FIRST SESSION

In re SAUNDERS (No. 16) Judgment 1528

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixteenth complaint filed by Mr. Yann Harris Saunders against the International Telecommunication Union (ITU) on 21 September 1995 and corrected on 29 September, the ITU's reply of 29 November 1995, the complainant's rejoinder of 30 January 1996 and the Union's surrejoinder of 5 March 1996;

Considering Articles II, paragraph 5, and VII, paragraphs 1 and 3, of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for the hearing of witnesses;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to this case are set out, under A, in Judgments 970, 989, 1018 and 1422.

On 23 April 1993 the complainant applied for a vacant post, No. S70/G7/135, but he proved unsuccessful. On 21 July 1994 the Secretary-General cancelled the appointment he had made to the post and convened a new Appointment and Promotion Board to re-examine the candidatures that the original Board had received. That was the decision the complainant impugned in his tenth complaint, which the Tribunal dismissed in Judgment 1422.

The new Board met on 12 December 1994. Having learned in a letter of 19 December from the Chief of the Personnel and Social Protection Department that the Secretary-General had picked someone else, the complainant sought review in a letter of 21 December 1994 headed "Appeal against an administrative decision". By a memorandum dated 2 February 1995 the Secretary-General confirmed his decision of 19 December 1994.

By a memorandum of 7 February 1995 the complainant asked the Secretary-General to explain to him, among other things, why his candidature had failed. In the absence of a reply he sent further requests for the information on 23 February and 10 March. By a memorandum of 14 March the Secretary-General invited him to take the matter up with a member of the Board. He did so on 23 May. The chairman of the Board accordingly told him in a memorandum of 24 May that the deciding factor had been his lack of a "good knowledge of the ITU's activities, including familiarity with its internal publication authoring and publication production processes".

By a letter of 29 May 1995 on his "Continued appeal against an administrative decision re your choice of a candidate to fill post S70/G7/135", he again sought review by the Secretary-General. On 19 August he appealed to the Appeal Board against the Secretary-General's implied rejection of his request dated 29 May. Failing a reply from the Administration within the four-week time limit under Staff Rule 11.1.1.4 a) he lodged the present complaint on 21 September. On 23 October the Secretary-General asked the Chairman of the Board for an exceptional extension of the time limit. By a memorandum of 26 October, of which a copy was addressed to the complainant, the Chairman of the Board gave the Secretary-General until 30 November to reply.

In a report dated 9 February 1996 the Board held that the complainant had failed to show that the Appointment and Promotion Board had gone beyond its terms of reference; but it recommended, in a spirit of "conciliation", that the Secretary-General consider changing the grade of his post from P.2 to G.7.

B. The complainant submits that the Personnel Department did not allow him to update the curriculum vitae that the Appointment and Promotion Board relied on. As a result the Board lacked proper information about his experience in the Documents and Publications Production Division and therefore overlooked essential facts.

He wants the Tribunal to set aside the decision of 2 February 1995 and award him damages in the amount of 50,000 Swiss francs for moral injury. He also claims costs.

C. In its reply the ITU contends that the complaint is irreceivable because the complainant failed, twice, to exhaust the internal remedies open to him.

First, he made no challenge to the Secretary-General's decision of 2 February 1995 within the three-month time limit on appeal to the Board set in Rule 11.1.1.2 b). Even if he made out that he had appealed to the Board against the decision of 24 May 1995 such appeal would have been time-barred under 11.1.1.2 a), which requires an official to seek review from the Secretary-General of an administrative decision before going to the Appeal Board and within six weeks of getting notice of it.

In this case the decision was the one of 19 December 1994 telling him his candidature had been unsuccessful.

Secondly, he came to the Tribunal without awaiting either the Appeal Board's report - which the Secretary-General receives under Rule 11.1.1.4 e) "within 10 weeks from the date on which the appeal was submitted" - or the Secretary-General's decision, be it express or implied, within the meaning of Article VII(3) of the Statute of the Tribunal.

D. In his rejoinder the complainant challenges the second Appointment and Promotion Board's reason for rejecting his application because it was not the same as the original Board's reason.

He also rebuts the Union's plea on receivability. In his submission the memorandum from the Chairman of the Appointment and Promotion Board dated 24 May 1995 contained a new fact on which he relied when he put his claim of 29 May 1995 to the Secretary-General for a fresh decision. That request, against the new decision of 24 May 1995, was properly filed within the time limit in 11.1.1.2 a). As for the time limit under 11.1.1.2 b) he was no less diligent since the subject of his appeal of 19 August 1995 was the Secretary-General's implied rejection of the request he had sent on 29 May 1995. He submits, lastly, that the Appeal Board failed to report within the 14-week limit in Rule 11.1.1.4 f).

E. In its surrejoinder the ITU presses its pleas on receivability.

CONSIDERATIONS:

1. As was recounted in Judgment 1422 on his tenth complaint, the complainant, who is a grade P.2 official of the ITU, applied on 23 April 1993 for a vacant G.7 post, No. S70/G7/135. He was unsuccessful, but on 21 July 1994 the Secretary-General set aside the appointment he had made and directed the Appointment and Promotion Board to base its recommendation on the candidates' merits alone, without considering any other element which might be brought to its knowledge.

2. A letter of 19 December 1994 from the Chief of the Personnel and Social Protection Department told the complainant that he had again been unsuccessful. He wrote a letter on

21 December asking the Secretary-General to review that decision. He asserted:

> "I contend and shall demonstrate if need be that the Board did not follow your recommendation and that its own recommendation to you was heavily influenced by factors extraneous to the qualifications and professional experience of the candidates."

3. The Secretary-General replied in a memorandum of 2 February 1995 that he had "received no indication that the [Board] has not followed the recommendation"; he therefore maintained his decision of 19 December 1994.

4. By a memorandum of 7 February the complainant asked the Secretary-General to answer several questions he put about the Board's composition and proceedings and in particular to say whether the new Board had "found that [his] qualifications, professional experience, etc. were inferior to those of the successful candidate". In his reply of 14 March 1995 the Secretary-General gave some explanation, but not the reasons for rejecting him, about which he suggested that the complainant approach a member of the Board in accordance with its rules of procedure. The complainant accordingly wrote to the chairman of the Board on 12 April. The chairman answered in a memorandum of 24 May that the reason why he had been unsuccessful was that he lacked a "Good knowledge of the ITU's activities, including familiarity with its internal publication authoring and publication production processes", which the notice of vacancy had required.

5. The complainant wrote the Secretary-General a letter on 29 May 1995 asserting that "no unbiased selection panel could ever have reached the conclusion that all the candidates [on] the short list ... had a better knowledge" than he of such activities. He asked the Secretary-General "once again to reconsider" his decision to appoint the successful candidate. He received no reply.

6. On 19 August 1995 he appealed to the Appeal Board "against the failure of the Secretary-General to act on my further request of 29 May 1995 that he review his decision to reject for the second time my application to fill post S70/G7/135". Without awaiting the outcome he filed this complaint with the Tribunal on 21 September 1995. In its report of 9 February 1996 the Board concluded that the Appointment and Promotion Board had not acted contrary to the rules or to the terms of its mandate.

7. The complainant's case is that the reason why the Appointment and Promotion Board declared him unqualified to fill the vacancy or even to be on the short list was that it

overlooked essential facts about his experience in the preceding three years and that those facts were missing from his personal records because the Personnel Department had refused to let him update them before the competition.

8. Rule 11.1.1.2 of the ITU Staff Regulations and Staff Rules provides:

> "(a) A staff member who ... wishes to appeal against an administrative decision, shall as a first step address a letter to the Secretary-General ... requesting that the administrative decision be reviewed. Such a letter must be sent within six weeks from the time the staff member received notification of the decision in writing.
>
> (b) If the staff member wishes to make an appeal against the decision contained in the answer received from the Secretary-General, he shall submit his appeal in writing to the ... Appeal Board within three months from the date of receipt of that decision. If no reply has been received from the Secretary-General within six weeks of the date on which the letter referred to in paragraph (a) was sent, the staff member shall, within the six following weeks, submit his appeal in writing to the ... Appeal Board ..."

9. The ITU contends that the administrative decision which the complainant is challenging is the one in its letter of 19 December 1994; that the rejection of his request for review was communicated to him in the Secretary-General's memorandum of 2 February 1995; that he failed to appeal within the time limit of three months in Rule 11.1.1.2 b); and that his complaint is irreceivable under Article VII(1) of the Tribunal's Statute because he has failed to exhaust the internal means of redress.

10. The complainant relies on the letter he wrote on 29 May 1995 to the Secretary-General. That, he says, was not a late request for review of the decision of 19 December 1994, but a request that the Secretary-General "review again his decision not to appoint him to the vacant post"; he made it as soon as he became aware of new facts in a memorandum of 24 May 1995 he got from the chairman of the Appointment and Promotion Board; he was not to blame for the delay in learning those facts; he got no reply from the Secretary-General within six weeks of sending his letter of 29 May; he appealed "within the six following weeks"; and so his appeal was in time.

11. The complainant argues as if he discovered some new fact from the chairman's memorandum of 24 May 1995. Yet he knew all along that the Board had not had his updated personal

records; and he was making out already in his letter of 21 December 1994 - quoted in 2 above - that he could demonstrate that the Board had not followed the Secretary-General's recommendation of 21 July 1994 and had instead been heavily influenced by extraneous factors. From the Secretary-General's reply of 2 February 1995, if not earlier, he knew the Secretary-General's position to be that the Board had followed that recommendation. So what he learned from the memorandum of 24 May 1995 was nothing new.

12. The relief he seeks is the quashing of the Secretary-General's decision of 2 February 1995. If he was dissatisfied with that decision the remedy that Rule 11.1.1.2 gave him was an appeal to the Appeal Board, not another request to the Secretary-General for review, whether of the decision of 19 December 1994 or the one of 2 February 1995. Not having lodged a timely appeal against the decision of 2 February, he failed to exhaust his internal remedies. And the precedents are clear: a reply to a further request for reconsideration is not a new decision setting off a new time limit for appeal. The complaint fails because it is irreceivable under Article VII(1) of the Tribunal's Statute.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

Wm Douglas
William Douglas

Mella Carroll
Mella Carroll

Mark Fernando

A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

EIGHTY-FIRST SESSION

In re SAUNDERS (No. 17)
(Application for review)

Judgment 1529

THE ADMINISTRATIVE TRIBUNAL,

Considering the application filed by Mr. Yann Harris Saunders on 22 August 1995 for review of Judgment 1421;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 7 of its Rules;

Having examined the written submissions;

CONSIDERATIONS:

1. The complainant, an official of the International Telecommunication Union (ITU), has lodged a series of complaints arising out of its decision to promote him at 1 January 1986 from a post in the General Service category of staff, at grade G.5, to one in the Professional category, at grade P.2. Because the pay of staff in the General Service category is expressed in Swiss francs, whereas the pay of Professional staff is set in United States dollars, the steady depreciation in the dollar against the franc since 1986 has had an adverse effect on the differential in pay between the two grades.

2. There is an explanation of the ITU's policy in Judgments 989, on Mr. Saunders' third complaint, under A, and 1093, also on his third complaint, under 5. Its Secretary-General set out the policy in a paper - CA 43/6729-E - submitted to its Administrative Council in 1988. The policy was to guarantee for staff promoted from the General Service to the Professional category that the salary differential resulting from the promotion would be equivalent to at least one step in the new grade as reckoned in local currency during the year following promotion. In Judgment 1093 the Tribunal held that that policy had been duly applied to the complainant in the year after his promotion, in which he had had an increase in pay higher than the equivalent of one step in grade P.2.

3. By 1991, however, he found that his pensionable remuneration at grade P.2 had fallen to a figure much lower than what it would have been had he not been promoted but had remained at grade G.5. He then asked that his pensionable remuneration be set at the higher figure. Rule 3.4.2.3 b) (formerly 3.4.2 c) of the ITU Staff Regulations and Staff Rules provides:

> "Where promotion from the General Service category to the Professional category results in a decrease of a staff

> member's pensionable remuneration, he shall keep his pensionable remuneration at the level which it had reached immediately prior to the promotion, until that level is exceeded as a result of advancement or further promotion."

The question was whether that Rule applied only to an immediate fall in pensionable remuneration at the time of promotion, or also to a subsequent decline in pensionable remuneration in the new post below what it would have been but for the promotion.

4. On that issue the Tribunal held in Judgment 1171, on Mr. Saunders's sixth complaint:

> "Since the complainant's promotion as from 1 January 1986 resulted in a decrease in his pensionable remuneration the Union was right to grant him the benefit of that rule. He was accordingly entitled to keep his pensionable remuneration at the level it had reached immediately prior to promotion until that level was exceeded as a result of advancement or further promotion. He may not properly object if since 1 January 1986 his pensionable remuneration has not increased, because he was appointed to P.2 at the highest step and has not received any advancement or further promotion since then."

5. In Judgment 1421 the Tribunal dismissed the complainant's ninth complaint, in which he applied for review of Judgment 1171.

6. In this complaint he is applying for review of Judgment 1421. He cites Judgments 257 (in re Grafström), 460 (in re Rombach) and 1370 (in re Sigrist) and contends that the Tribunal has not followed those precedents. In other words, what he is alleging is a mistake of law.

7. In Judgment 442 (in re de Villegas No. 4) and in many later judgments the Tribunal has declared an alleged mistake of law to be an inadmissible plea for review. To allow an application for review on the grounds that the Tribunal's legal reasoning was wrong would be to let anyone who was dissatisfied with a decision question it indefinitely in disregard of the res judicata rule.

8. The conclusion is that the application must be summarily dismissed as clearly irreceivable under Article 7 of the Tribunal's Rules.

DECISION:

For the above reasons,

The application is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

Wm Douglas
William Douglas

Mella Carroll
Mella Carroll

Mark Fernando

A.B. Gardner
A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FIRST SESSION

In re HAENNI and PERRUCHI-HAENNI Judgment 1530

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Pierre-Pascal Haenni and Mrs. Françoise Perruchi-Haenni against the Intergovernmental Organisation for International Carriage by Rail (OTIF) on 22 September 1995, OTIF's reply of 10 November, the complainant's rejoinder of 29 November 1995 and the Organisation's surrejoinder of 12 January 1996;

Considering Article II, paragraphs 5 and 6, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainants are the children and heirs of the late Joseph Haenni, a Swiss citizen born in 1904 and former Director of the Central Office for International Carriage by Rail (OCTI), the Organisation's secretariat. Joseph Haenni joined OTIF on 1 January 1959. At that time there were Rules on the organisation and operation of the Central Office and the conditions of employment of its staff. The Rules had come into force on 17 April 1956. Article 25, headed "Savings and Survivors' Insurance Fund", read:

> "1. Each year the Office shall enter in its budget a sum equivalent to 15 per cent of the basic salary of its serving permanent employees and the amounts of the insurance contributions set by the competent authority at the date of retirement of permanent employees. Those sums shall constitute and add to the insurance funds available for each employee ...
>
> 2. With the exception of certificates for mandatory social insurance, the insurance funds so constituted shall be deposited in the Swiss National Bank in portfolios

> bearing the official's name. After his death they shall be paid out to his statutory heirs and legatees upon authentication of their status by the authorities of the official's home country ..."*

New Rules came into force on 1 December 1966. They replaced the scheme established by Article 25 of the 1956 Rules with a scheme of invalidity, old-age and survivors' insurance under the Swiss Federal Insurance Fund for permanent staff and members of their families. But anyone who had joined the Organisation before 1 December 1966 might opt to remain in the old scheme. Joseph Haenni did so.

At its 32nd Session on 3 February 1970 OTIF's Administrative Committee allowed him to claim his retirement entitlements as from 1 July. At its 33rd Session, held from 20 to 22 May 1970, it decided that after his retirement the Office would continue to pay the equivalent of 15 per cent of his salary into the savings fund constituted on his behalf in accordance with the 1956 Rules.

On 1 January 1980 Staff Regulations superseded the 1966 Rules. By a letter of 11 July 1980 the Director General of the Office informed the complainants' father that the new Regulations included transitional provisions to maintain the rights acquired by officials under the former Rules; so Article 25 of the 1956 Rules, appended to the new Regulations, continued to apply to him.

By a letter of 20 November 1991 the Director General informed him that in view of the Tribunal's ruling in Judgment 1125 of 3 July 1991 (in re Lehmann-Schurter) the amount of the insurance contributions paid into the fund on his behalf would be reduced from 15 to 8 per cent of basic salary.

New Staff Regulations which took effect on 1 January 1993 reproduced in Article 5 of Annex IV the transitional provisions of the 1980 Regulations.

Their father having died on 11 January 1995, the complainants asked the Organisation in a letter of 18 February to pay them the full amount of the savings fund constituted on his behalf, which came to 618,457.85 Swiss francs. On 23 May the Administrative Committee offered them a compromise which amounted to a decision within the meaning of Article 58.1 of the Staff Regulations and which it adopted at its 83rd Session. It revised its decision of May 1970 and set the amount of the fund at the time of Joseph Haenni's retirement at 113,891 francs, adding yearly interest at 5 per cent, which made a total of 385,675 francs to be paid to the complainants. On 20 June 1995 the complainants appealed to the Committee against that decision.

---

* Registry's translation.

On 25 August 1995 the Committee rejected their appeal. It stated that a teleological construction should be put on Article 25 of the 1956 Rules and that the Committee's decision of 1970 was unwarranted and arbitrary since by then Joseph Haenni had no dependants. It accordingly informed the complainants that it upheld its decision of 23 May 1995. It also told them that Article 5 of Annex IV to Article 69.2 of the 1993 Regulations would be amended: the scheme established under Article 25 of the 1956 Rules would not apply "where it is clear that the former official has no dependants"; in such cases statutory heirs or legatees would be paid only the amount that was in the Fund at the date of the official's retirement. That is the decision they are impugning.

B. The complainants submit that Article 25 of the 1956 Rules will bear a literal construction only and that what it sets up is unmistakably a provident fund to serve as survivors' insurance in the event of a former official's death.

They contend that the Administrative Committee's decision of 23 May 1995, confirmed by its decision of 25 August 1995, impairs their acquired rights as the successors of Joseph Haenni. The successive versions of the Staff Rules and Regulations, including the 1993 Regulations, contain transitional provisions to ensure observance of those rights. The impugned decision is therefore arbitrary and has no basis in law. What is more, it offends against the Committee's decision of May 1970 to continue to pay 15 per cent of their father's basic salary into the insurance fund after his retirement. It disregards the Director General's letter of 20 November 1991 telling him that the Organisation would reduce its insurance contribution to 8 per cent, and the letter of 11 July 1980 assuring him that his acquired rights would not be impaired.

OTIF may not plead that it decided to revise the amount of the insurance fund on the grounds that there were no dependants: in May 1970 it already knew that there were none. To rely on a mistake it made at the time and apparently perpetuated until 1994 amounts to a breach of good faith in the light of the Committee's decisions and its communications to Joseph Haenni and later to his children. There is breach of the Organisation's practice of contributing annually to the fund. And applying the amendment of the Staff Regulations retroactively to the complainants offends against general principles of law.

The complainants seek payment of the 618,457.85 Swiss francs, interest at the rate of 5 per cent a year as from 18 January 1995, and costs.

C. In its reply the Organisation contends that, though the text of Article 25 of the 1956 Rules is plain, it is to be given a teleological construction. The purpose of the scheme is not to constitute a lump sum for the family but to provide a substitute for the widow's and orphan's benefits that Articles 21.1 and 24.1 of the 1956 Rules preclude. Besides, Article 25 must be read together with Article 24.3, which lists those who come under the term "survivor" to include "other persons for whose maintenance the employee was responsible and from whom he received care". If Article 25 were taken literally, any natural or legal person designated in the will of the deceased might claim payment from the fund. So the Committee's decision of May 1970 was arbitrary and unwarranted and its compromise decision of May 1995 corrected past mistakes.

As to the Director General's letter of 11 July 1980, OTIF asserts that the acquired rights it refers to arise out of its own interpretation and reasonable application of Article 25. The article was amended merely to clarify the draughtsman's intent; so it cannot be retroactive.

D. The complainants rejoin that OTIF's reply offends against general precepts of law.

Citing Judgment 1125, they submit that where a text is clear it is wrongful to let any teleological construction prevail over the literal one.

E. In its surrejoinder OTIF pleads doubt about the exact meaning of Article 25, if only the term "insurance funds": if a retired employee has no dependants the fund amounts to capital for the statutory heirs or legatees.

It cites Judgment 1125: "the Administrative Committee has wide discretion under Article 25 to take account of personal circumstances before reaching a decision in the general interest".

CONSIDERATIONS:

The main issues of fact

1. Joseph Haenni, who was born on 28 May 1904, served in the Swiss Civil Service as Deputy Director of the Federal Transport Office, then in the Central Office for International Carriage by Rail, the secretariat of the Intergovernmental Organisation for International Carriage by Rail (OTIF). He was Director from 1 January 1959 to 30 June 1970, when he retired.

2. Judgment 1125 (in re Lehmann-Schurter) of 3 July 1991 describes the Organisation's retirement scheme for staff appointed before 1 December 1966. The parties cite the judgment, which has a bearing on this case. Under a scheme of social security that OTIF adopted in 1966 its staff were affiliated to the Federal Insurance Fund which provides retirement and survivors' insurance for Swiss federal civil servants. But any OTIF official recruited before 1 December 1966 was free to stay with the old scheme. Under that scheme a fund was set up for the official's statutory heirs or legatees, to be made over to them after his death. OTIF paid into the fund each year a sum equivalent to 15 per cent of the serving official's salary and after retirement an amount set by the Organisation. Joseph Haenni opted for the old scheme.

3. At its 33rd Session, held from 20 to 22 May 1970, the Administrative Committee of OTIF decided to go on contributing each year to the fund set up on Joseph Haenni's behalf a sum equal to 15 per cent of his yearly salary of 96,200 Swiss francs. It so informed him. Such amounts were paid each year into an account set up for him at the Swiss National Bank. After retirement he got yearly statements of account which he endorsed and returned. The last such statement, which he duly signed, was sent on 9 February 1994. The covering letter spoke of "your insurance fund"; the actual statement reported a "credit balance corresponding to assets in savings account at 15.2.1994" and totalling 618,457.85 Swiss francs.

4. After the new scheme had come in OTIF had difficulty in applying the rule about payment of capital to heirs of staff recruited before 1 December 1966 who had opted for the old scheme. The difficulty arose because under the new scheme the purpose of survivors' insurance is to make good the loss of expectation of maintenance benefit for any widow or dependent child. The issue was raised in Mrs. Lehmann-Schurter's case and Judgment 1125 resolved it in part. The gist of that judgment was as follows. The Tribunal acknowledged in 2 that under the old scheme the retired official was entitled to challenge OTIF's decision about its contributions after retirement. The text of Article 25 of the 1956 Rules was plain

and not open to an interpretation contra legem. It required the Organisation to contribute 15 per cent of the salary for a serving official and to make contributions for retired staff as well, though the amount was not set, the Organisation being allowed some discretion on that score. The Tribunal further held in 10 that the official's having no spouse or dependent child upon retirement afforded no grounds for the Organisation's declining to contribute. The Organisation and Mrs. Lehmann-Schurter thereupon agreed that its contribution would amount to 8 per cent of her salary for the duration of her retirement.

5. On the strength of that judgment and the agreement with Mrs. Lehmann-Schurter OTIF made a proposal to Joseph Haenni, who had neither wife nor dependent child: its contribution would thenceforth amount to 8 per cent of his salary, in line with a decision the Administrative Committee had taken on 14 November 1991, at its 76th Session. He agreed, and the Director General acknowledged as much in a letter of thanks written to him on the Organisation's behalf on 20 November 1991. So in the ensuing years OTIF paid its contributions for him at the lower rate of 8 per cent of basic salary.

6. On 11 January 1995 Joseph Haenni died at Sion, in Switzerland. His heirs are the complainants: his daughter Françoise Perruchi, born on 4 July 1931, and Pierre-Pascal Haenni, born on 18 October 1939. They asked OTIF to make over to them the lump sum deposited in the account on their father's behalf at the Bank. On 23 May 1995, at its 83rd Session, the Administrative Committee decided to pay them an amount equivalent only to the contributions paid at the rate of 15 per cent of salary while he was a serving official, plus interest at the rate of 5 per cent a year, or a total of 385,675 Swiss francs. The sum did not include contributions paid into the account at the Bank after his retirement. His heirs made an appeal against that decision, but the Administrative Committee rejected it by a decision of 25 August 1995. In the Committee's view Article 25 of the 1956 Rules was to be construed in the light of the new rules, which reflect up-to-date thinking on social security, benefits being paid to survivors - widow or widower and dependent child - only if the official was actually maintaining them. The earlier decisions about payments into Joseph Haenni's account, being wrong, should be reversed and replaced with a decision in keeping with the rules.

The heirs claim payment of the 618,457.85 Swiss francs, i.e. the amount held at 18 February 1995 in the account in their father's name at the Bank, plus interest reckoned at the rate of 5 per cent a year from that date. They rely on a literal construction of Article 25 of the 1956 Rules which they say reflects the draughtsman's intent and squares with the agreements between their father and OTIF about the amounts to be paid into his account at the Bank.

The merits

7. Under OTIF's former scheme of social security sums were paid into the official's account at the Swiss National Bank on the strength of the decisions in force at the time and agreements reached with the official. As was held in Lehmann-Schurter, the Organisation's contributions were eventually to go to the official's statutory heirs or legatees but were paid into an account opened on his behalf and he was free to challenge any decision the Organisation took about that account. So such decisions were not internal measures but binding on the Organisation and subject to revision only if requirements for such revision were observed.

There is no need, however, to go into those requirements here. The decision that the Administrative Committee took at its 33rd Session was revised at its 76th Session, with Joseph Haenni's approval. The arguments that OTIF put forward at the time were those it offered in answer to Lehmann-Schurter and that it is submitting again in this case. OTIF followed Judgment 1125 in reaching agreement with the complainants' father. There have since been no new facts, and it may not plead any mistake it discovered afterwards. So it is in bad faith in trying to discard the compromise to which it and the official on behalf of his future heirs had consented: see by way of analogy Judgments 767 (in re Cachelin) and 1053 (in re Beetle and others).

8. Besides, even if there could be formal revision of that decision there would obviously be no substantive reasons for it.

The impugned decision is a wilful departure from Judgment 1125 and does not even address the reasoning therein. What that judgment says is that under Article 25 of the 1956 Rules the Organisation must go on contributing after the official's retirement, though it may at discretion determine the rate of contribution, and the official's having no spouse or dependent child does not allow it to stop contributing. There is no reason not to follow that precedent. OTIF was well aware of the consequences of letting staff choose between two schemes, and one of them was that it promised to respect the choice. Its promise was indeed a determinant of contractual relations between the parties. It is not free to go back on its promise to its former officials and their heirs just because the old system is no longer in tune with ideas of social security that have of late won widespread favour. Its earlier decisions which it wanted to change were therefore in any event quite lawful and it may not revise them on the grounds that they were not.

By the impugned decision of 25 August 1995 the Administrative Committee said that, to put paid to discussion on how to construe Article 25, it had amended Article 5 of Appendix IV to Article 69.2 of the 1993 Staff Regulations by way of "clarification": henceforth an official's heir who had not been his dependant would get no payment from OTIF into the account set up for the heirs after the date of the official's retirement. Contrary to what OTIF makes out in its reply, the purported "clarification" is not in line with any proper construction of the material rules and may not retroactively affect the complainants' entitlements.

The complainants are therefore entitled to full payment of the amount that OTIF deposited in the account at the Bank.

They are also entitled to costs.

DECISION:

For the above reasons,

1. The impugned decision being set aside, the Organisation shall pay the complainants collectively the sum of 618,457.85 Swiss francs, plus interest to be reckoned at the rate of 5 per cent from 18 February 1995.

2. It shall pay the complainants collectively 8,000 Swiss francs in costs.

In witness of this judgment Mr. Michel Gentot, Vice-President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

(Signed)

Michel Gentot Julio Barberis Egli

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL | INTERNATIONAL LABOUR ORGANIZATION

TRIBUNAL ADMINISTRATIF | *ADMINISTRATIVE TRIBUNAL*

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FIRST SESSION

In re WASSEF (No.9) Judgment 1531

THE ADMINISTRATIVE TRIBUNAL,

Considering the ninth complaint filed by Mr. Maher Nabih Wassef-Gerges against the Food and Agriculture Organization of the United Nations (FAO) on 23 March 1995 and corrected on 6 April, the FAO's reply of 3 July, the complainant's rejoinder of 22 July and the Organization's surrejoinder of 18 December 1995;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Information on the complainant's career at the FAO and on the illness which he contracted on mission in Chad appears, under A, in Judgments 1401 and 1486 on his first, second and eighth complaints. His own doctor having declared him "clinically cured" on 4 January 1994, he was separated from service on 7 January 1994.

On 15 March 1994 he lodged an internal appeal, No. 447, with the Appeals Committee seeking reversal of the decision to separate him from the Organization and an award of one million United States dollars in damages.

On 22 March 1994 he filed another appeal, No. 448, with the Committee making other claims.

By a letter of 1 February 1995, which he impugns, the Director-General endorsed the Committee's recommendations on both appeals.

B. The complainant submits that the FAO acted unlawfully by separating him while he was ill but before his entitlement to sick leave had run out. He also alleges that the decision of 23 February 1994 giving him notice of separation was "based on" improperly disclosed confidential information, deliberate distortions of fact, "false citation", misuse of authority, swindling, "deprivations of rights and entitlements" and harassment.

In any event the impugned decision was, he says, "irreceivable" because the Director-General failed to act within sixty days of getting the Appeals Committee's report.

He asks the Tribunal to declare:

"1.1 the invalidity, illegality and the irreceivability of the Director-General's Reply dated 1 February 1995 and despatched on 2 February 1995 since it should have been made not later then 8 January 1995,

1.2 its condemnation to the Administration's disrespect for this Tribunal's Rules governing the time limit for above Reply (otherwise this Reply should have not been made after 8 January 1995),

1.3 the receivability of this complaint because;

- it is submitted to this Tribunal within the time limits of 150 days from the date of the Report of the Appeals Committee calculated on the basis of 60 days time limit for the Director-General's Reply from the date of the Report (i.e. time limit expires on 8 January 1995), plus 90 days time limit for submission of my complaint from the date of the expiry of the Time limit for the Reply of the Director-General,

or because;

- it is submitted to this Tribunal within ninety days time limit from the receipt of the Report of the Appeals Committee which was enclosed with the irreceivable Reply of the Director-General despatched on 2 February 1995,

1.4 the merit of each of the following wrongdoings having only in view the "Basic Considerations" and the "Requirements of Integrity, Honesty and Impartiality" clearly highlighted in the "Standards of Conduct in the international civil service" and away from any complimentary considerations to the FAO Administration whatever political and/or diplomatic pressures FAO may exert;

- divulge and publication of personal medical confidential information,
- deliberate distortions of facts and of medical reports and false citation,
- use and abuse of distortions and false citation,
- abuse of power and authority - swindling
- deprivations of rights and entitlements - harassment

2. ... that a separate discussion and a separate judgment be made for each of my complaints based on the merits of each of them, and respectfully submit my objection for any judgment which covers more than one case at a time,

3. ... the quashing of the separation decision,

4. ... the express [sic] of the invalidity of this retroactive separation decision,

5. ... that this tribunal recognises and holds the FAO responsibility and liabilities for the irreparable damages caused to the contributions to my pension funds and caused to my pension entitlements,

6. ... that my sick leave be approved from 23 August 1993 until the expire [sic] of the 9 months sick leave with full-pay and the other 9 months sick leave with half-pay with the supplementation for this half-pay salary (for the second period of nine months),

7. ... the payment of my due salaries under point (6) above plus my normal full-pay salary until the judgment of this case is announced in public,

8. ... the recall of all copies of the Memorandum/Letter of my Personnel Officer dated 23 February 1994,

9. ... the award of US $ 1 Million (US Dollars One Million) as a compensation for the moral and financial damages and injuries resulting from the divulge and the publication of personal confidential medical information, from the deliberate distortions of facts and of medical reports and false citation from the use and abuse of distortions and of false citation

and deprivations of rights and entitlements, from the abuse of Power, of Authority and swindling,

10. ... the payment of a lump sum of US $ 7,500.00 for photocopies, secretarial assistance, postage, stationery, etc...

11. ... the reimbursement by the FAO for the cost of publication of this judgment in 4 American, 4 European and 4 Arab daily newspapers and magazines and the Tribunal's non-objection for the discussion of this corruption in public.

12. ... that this judgment contains a penalty clause for its execution within 30 days from the date of this judgment equivalent to 50% of the total of all salaries, entitlements and awards for every two weeks of delay by the FAO Administration."

C. In its reply the FAO points out that since its rules set no time limit for a decision by the Director-General the challenged decision cannot be out of time. At all events most of the complainant's claims, since he did not put them to the Appeals Committee, are irreceivable: namely, his claims to more sick leave, to pay during litigation, to the costs of photocopying and publication, to a penalty clause for delay in execution and to damages for loss of pension entitlements.

His other claims are unsound. The Administration has not disclosed any confidential medical information, he himself having identified his illness in correspondence with the Administration. Nor is he entitled to another appointment, his last one having expired lawfully after a three-month extension for medical reasons.

D. In his rejoinder the complainant points out that he is challenging the rejection of his appeal of 15 March 1994, not of the one of 22 March. He answers the FAO's pleas on receivability and presses his claims.

E. In its surrejoinder the FAO withdraws its challenge to receivability and submits that the complaint is devoid of merit. The Organization was under no duty to keep him on sick leave until "all possible traces" of his illness disappeared: his entitlement to such leave ended when the medical officer found him fit for work.

CONSIDERATIONS:

1. The complainant's career at the FAO, which he left on 7 January 1994, and facts relevant to the present dispute are set out under A in Judgments 1401, on his first and second complaints, and 1486, on his eighth. Having caught hepatitis B while on duty in Chad in 1993, he saw fit to lodge many appeals with the Organization, some of them obscure in purpose. Although the Tribunal has dismissed several of his complaints, Judgment 1486 declared his illness to be service-incurred within the meaning of Manual paragraph 342.213.

2. On 3 March 1994 he appealed to the Director-General against a memorandum of 23 February in which a personnel officer told him that the date of his separation from the Organization was 7 January 1994. He asked for the reversal of the decision to separate him from the FAO, withdrawal of all copies of the memorandum and payment to him of one million United States dollars in damages for harassment, disclosure of privileged medical information and "injustice", and for any other injury he had sustained. By a letter of 9 March the Assistant Director-General in charge of the Administration and Finance Department rejected his claims on the Director-General's behalf. On 15 March he submitted to the Appeals Committee an appeal, No. 447, against that rejection. In a letter of 1 February 1995 the Director-General rejected it, as indeed the Committee had recommended. That is the decision he is impugning. His twelve heads of claim are set out under B above.

3. "Claim" 1 consists merely of pleas or applications for rulings on matters of procedure. In any event the complainant has failed to draft them plainly or coherently enough for the Tribunal to determine what it is he wants. So it will deliver no formal ruling on them.

4. The complainant's claim 2 - his objection to joinder - succeeds: since his complaints arise out of different causes of action they are not joined.

5. In support of his claims under 3 and 4 about the quashing of the decision to separate him he submits that the memorandum of 23 February 1994, to which the Tribunal refers in 2 above, contains a decision that is unlawful because it was taken when he was still on sick leave.

6. The plea is devoid of merit. The memorandum did not terminate an appointment that had yet to expire. His appointment at the FAO was for a fixed term, and under Staff Rule 302.907 such appointments expire, without notice, at the scheduled date. The complainant's appointment expired at

30 September 1993, and the extension the FAO granted him was for medical reasons. So the memorandum merely referred to the date at which his sick leave ended and thereby gave the date of separation. The complainant's doctor having certified on 4 January 1994 that he was fit to go back to duty as long as he did not overwork, the FAO accordingly decided he should leave at 7 January, three days after his sick leave had ended, to allow time for final "debriefing".

7. He maintains that on 7 January 1994 he was still on sick leave. But sick leave ends when the competent medical officer declares the official fit to go back to work. That is why the Organization made the date on the medical certificate the last day of the complainant's sick leave. It was under no duty to grant him special leave on partial pay while he was convalescing because Manual paragraph 302.625 lays no such duty on it. Nor is there any provision under which it must extend a fixed-term appointment to cover convalescence, let alone until all trace of illness has gone. The conclusion is that the decision to set the date of separation at 7 January 1994 was lawful.

8. Yet, though it was lawful for the memorandum of 23 February 1994 to set that date, not until 25 February did the complainant get notice of it. According to a general principle no decision unfavourable to an official may take effect before the date at which he gets notice of it. So the earliest date at which the complainant's separation from service might take effect was 26 February 1994, the day after he had notice of it, and he is entitled to an award of damages on that count.

9. With that sole exception claims 3 and 4 fail, as does claim 5, which hinges thereon.

10. Claim 6 is to extension of the complainant's sick leave and to payments due on that account. But he failed to make the claim in his internal appeal which has culminated in the final decision impugned in this case, and before the Tribunal the claim is a new one. Under Article VII of the Tribunal's Statute a complaint is receivable only if the impugned decision is a final one and the complainant has exhausted all the remedies open to him under the Staff Regulations. The Tribunal has often held, as in Judgment 1443 (in re Vollering No. 6), that a complainant may not broaden the scope of the claims he made in the internal proceedings when he comes to the Tribunal. So the claim about sick leave is irreceivable.

11. Since claim 6 fails so too does the dependent claim 7.

12. On claim 8 he submits that the FAO divulged privileged medical information and that its employees' indiscretion made his illness known to others. The Organization replies that the only people who had access to the information were the officials who needed it for the performance of duty and they always treated it in strict confidence.

13. It is the complainant himself, through his many memoranda, protests, appeals and complaints, who has done much to spread the information he now wants to keep secret. His memorandum of 13 September 1993, for example, spoke of his illness, and he himself sent it to the medical service and copies to other officials. Besides, the Tribunal's widely published judgments on his complaints necessarily mention his illness, not least Judgment 1486, which declared it to be service-incurred. Under the circumstances the mere "withdrawal" of the memorandum would not in any way safeguard the confidentiality of his medical records. Inasmuch as claim 8 shows no cause of action it too fails.

14. Claim 9 seeks damages for injury the complainant attributes to the disclosure of privileged medical information and other offences with which he charges the Organization. As for the disclosure of material information not only is he himself largely to blame, as was said in 12 above, but he offers not a shred of evidence to suggest that it did him any harm. As for the various other offences he alleges, the Tribunal dismissed a claim of his, in Judgment 1485, to payment of 5 million dollars by way of damages for "inflicted atrocities" on the grounds that the claim was too vague and rested on no unlawful act he imputed to the Organization. Claim 9 fails for the same reasons: for it to succeed he should first have exhausted the internal remedies open to him and identified the final decisions he meant to challenge.

15. As to his claim 10, which is to costs, the Tribunal observes, in view of the intemperate language of his submissions, that he owes a duty of respect to the defendant and to its staff. Though his complaint succeeds in part, his claim to costs is disallowed because he has not fulfilled that duty.

16. Lastly, his claims 11 and 12 are unwarranted: indeed he himself does not even offer reasons why they should succeed.

DECISION:

For the above reasons,

1. The memorandum of 23 February 1994 setting the date of the complainant's separation from service takes effect only as from 26 February 1994.

2. His other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Julio Barberis, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

(Signed)

William Douglas Mella Carroll Julio Barberis

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FIRST SESSION

In re WASSEF (No. 10) Judgment 1532

THE ADMINISTRATIVE TRIBUNAL,

Considering the tenth complaint filed by Mr. Maher Nabih Wassef-Gerges against the Food and Agriculture Organization of the United Nations (FAO) on 31 March 1995 and corrected on 11 May, the FAO's reply of 3 July, the complainant's rejoinder of 22 July and the Organization's surrejoinder of 18 December 1995;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Information about the complainant's career with the FAO and about the illness he caught while on mission in Chad appear under A in Judgments 1401 on his first and second complaints and 1486 on his eighth one. His own doctor declared him on 4 January 1994 to be "clinically cured" and he left the Organization's service on 7 January.

On 22 March 1994 he filed an internal appeal, No. 448, with the Appeals Committee asking that, without awaiting the medical board's findings, the Organization recognise that his illness was service-incurred, pay the travel and subsistence expenses incurred by his wife for the purpose of being with him in Paris when he was ill, acknowledge his right to be re-employed after twelve to eighteen months and grant him 2 million dollars in compensation. In its report of 8 November 1994 the Committee recommended rejecting all his claims as unfounded, save the one about his illness, which it held to be premature.

In a letter of 1 February 1995, which the complainant is now challenging, the Director-General approved, among other things, the Committee's recommendation and rejected his appeal.

B. The complainant charges the FAO with negligence, misrepresentation and victimisation. In his submission the Director-General took his decision after "all time limits" had run out. Under the material rules the Organization should have paid to let his wife go with him to Paris, where it had sent him for medical treatment. Since his "partial incapacity" limits his earning power the Organization has a duty to employ him. He complains of the FAO's "inscrutable and unclean manipulations of law-making process" and its "sovereign disdain" for human rights.

He asks the Tribunal to "express":

"1.1 the invalidity and the illegality of the Report of this Appeals Committee and that its contents are null and void,

1.2 its condemnation to the Administration's disrespect for this Tribunal's Rules governing the time limit for the Director-General's Reply,

1.3 its disallow to the Administration's objections to receivability and its procedural tactics which offend the good faith that govern the relations of this Court with the staff.

2. ... that a separate discussion and a separate judgement be made for each of my complaints based on the merits of each of them, and respectfully submit my objection for any judgement which covers more than one case at a time,

3. ... the quashing of the separation decision, the Director-General's decision and request the payment of my due salaries on a continuous basis (please see point 4 below) disregarding of both the source of funding for my last assignment which is irrelevant and any third party's approval for my extension seen that my entitlements have been acquired under the FAO Staff Regulations as an FAO staff member,

4. ... the recognition, as a precedent and a principal, of my service-incurred illness without recourse to the medical board due to the more then considerable lapse of time of unhealthy manipulations - 600 days since my evacuation and more delay yet to come - even if, in the meantime, my service-incurred illness has been recognised by either this Tribunal or the Director-General on other grounds, thus condemning this practice of inhuman torture by the Medical Service,

5. [that the Tribunal] impose by all means and ways on the Administration of FAO the recognition of my right for re-employment and the actual re-employment itself, without any further delay in conformity with the spirit of Manual Section 342.5 and basically on the basis of all human rights' measures which should have only been taken into consideration in such case without recourse to any wilful trickery and as a result of my physical incapacity,

6. The approval of my wife's travel to Paris to assist me in attending to the daily personal life requirements and the reimbursement of all related expenses,

7. The payment of US $ 3 (Three) Millions as a compensation for this specific "electrical chair" lengthy and continuous psychological, moral and physical torture during sickness and its immediate and future consequences,

8. The payment of a lump sum of US $ 8,000 = for photocopies, secretarial assistance, postage, stationery, etc.

9. ... that this Tribunal recognises and holds the FAO responsibility and liabilities for the irreparable damages caused to the contributions to my pension funds and caused to my pension entitlements,

10. ... the reimbursement by the FAO for the cost of publication of this judgement in 4 American, 4 European and 4 Arab daily newspapers and magazines and the Tribunal's non-objection for the discussion of this corruption in public.

11. ... that this judgement contains a penalty clause for its execution within 30 days from the date of this judgement, equivalent to 50 % of the total of all salaries entitlements and awards for every two weeks of delay by the FAO Administration."

C. In its reply the FAO points out that since its rules set no time limit for a decision by the Director-General the challenged decision cannot be out of time. And the complainant's claims to $3 million in damages, to the costs of photocopying and publication, to a penalty clause and to damages for loss of pension entitlements are irreceivable because he failed to put them to the Appeals Committee. Although he has lodged a claim to recognition that his illness was service-incurred it has not yet gone to the competent medical board and so is premature.

His other claims are devoid of merit. He has no right to another appointment, his last one having expired lawfully after the grant of a three-month extension for medical reasons. Because his wife was no longer resident at his duty station when the FAO sent him to Paris, the rules did not allow the Director-General to authorise her to travel there.

D. In his rejoinder the complainant answers the Organization's pleas and presses his claims.

E. In its surrejoinder the FAO disputes allegations in the rejoinder and says he should have pursued his internal remedies before asking the Tribunal to declare his illness service-incurred.

CONSIDERATIONS:

1. The complainant is challenging a decision the Director-General took on 1 February 1995 on a recommendation by the Appeals Committee to reject one of his many internal appeals, No. 448. The claims he put forward in the internal proceedings are set out above under A. His eleven claims in his complaint to the Tribunal are quoted in full under B.

2. The "claims" under 1 consist of mere pleas or applications for rulings on matters of procedure. In any event the complainant has failed to draft them plainly or coherently enough for the Tribunal to determine what it is he wants. So it will deliver no formal ruling on them.

3. The complainant's claim 2 - his objection to joinder - succeeds: since his complaints arise out of different causes of action they are not joined.

4. Claim 3, to the quashing of the decision to separate him from service, is irreceivable under Article VII(1) of the Tribunal's Statute. Not having made it in his internal appeal, he has failed to exhaust his internal remedies. Besides, the Tribunal rules on the claim in Judgment 1531, delivered this day, in 3 to 7. So there is no substance to it.

5. Claim 4, to recognition of his illness as service-incurred, fails, again because there is no substance to it, the Tribunal having ruled in Judgment 1486.

6. His claim 5 is to re-appointment in the FAO and he rests it on Manual paragraph 342.335.

7. The appointment he had was for a fixed term, and it expired. Manual paragraph 305.5123 says that the holder of a fixed-term contract has no right to the extension of his appointment. That too is the consistent thrust of precedent. Paragraph 342.335, on which the complainant relies, applies only where an appointment expires for reasons of service-incurred illness. But his did not, so he has no right to re-employment in the FAO, and his claim therefore fails.

8. His sixth claim is to the refund of expenses his wife incurred while he was in hospital in Paris and of the cost of her travel from Rome to Paris and back. In support he adduces, among other items, two certificates. One, dated 6 September 1993, is from the Hospital of the University of Paris and says that the state of his health required the company of his wife while he was there. The other, which his own doctor provided on 9 September, said: "The patient still needs ... support from his family". He observes that his wife always accompanied him abroad and that only because of administrative difficulties raised by the Italian authorities was she four months late in joining him at N'Djamena, in Chad. Although she was no longer in Chad when the FAO sent him to the hospital in Paris, that, he says, was because the Organization had on 28 February 1992 sent her too out of the country for reasons of health.

9. The FAO submits that under Staff Rule 302.651 and Manual paragraph 409.11 the Director-General could have authorised his wife's going to Paris only if she had been with him in N'Djamena at the time; but she was not.

10. The Tribunal is not satisfied that the Organization's answer is sound. Insofar as the reasons for his wife's absence were not plainly established the complainant should have been granted the benefit of Manual paragraphs 409.122 and 409.523 on the strength of the two medical certificates. Under the circumstances claim 6 succeeds.

11. Claim 7 is to the award of 3 million dollars in damages for "lengthy and continuous psychological, moral and physical torture during sickness and its immediate and future consequences". The complainant accuses the Organization's medical service of lying, harassment, racial discrimination and so forth. In Judgment 1485 the Tribunal dismissed a claim from him to the payment of 5 million dollars in damages for alleged "atrocities" on the grounds that his claim was too vaguely worded and challenged no particular decision by the Organization. The Tribunal dismisses a similar claim for the same reasons in Judgment 1531. On the same grounds claim 7 fails too.

12. His claim 9, being a corollary of claim 3, fails as well.

13. His claim 8 is to costs. Again the Tribunal reminds him, in view of the intemperate language of his submissions, that he owes a duty of respect to the Organization and to its staff. Because he has failed in that duty the Tribunal disallows his claim to costs, even though one of his claims succeeds.

14. Lastly, his claims 10 and 11 are unwarranted: indeed he himself does not even offer reasons why they should succeed.

DECISION:

For the above reasons,

1. The FAO shall pay the complainant the expenses incurred on account of his wife's stay in Paris while he was in hospital and the costs of her journey from Rome to Paris and back.
2. All his other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Julio Barberis, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

(Signed)

William Douglas Mella Carroll Julio Barberis

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

Registry's translation,
the French text alone
being authoritative.

EIGHTY FIRST SESSION

In re WASSEF (No. 13)

Judgment 1533

THE ADMINISTRATIVE TRIBUNAL,

Considering the thirteenth complaint filed by Mr. Maher Nabih Wassef-Gerges against the Food and Agriculture Organization of the United Nations (FAO) on 26 July 1995, the FAO's reply of 31 October, the complainant's rejoinder of 29 November 1995 and the Organization's surrejoinder of 1 March 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to this dispute appear under A in Judgment 1453, which dismissed Mr. Wassef's fourth complaint.

On 6 April 1994 he filed an appeal with the Director-General claiming 8,000,001 United States dollars for the "libel and defamation" he saw in a letter of 8 March 1994 from the Director of the Division of Personnel. In that letter the Director denied the complainant's contention that on 5 October 1992 the Assistant Director of the Division of Administrative Services had orally offered him transfer under a continuing appointment to a grade P.4 post at headquarters.

By a letter of 3 May the Assistant Director-General told the complainant that his appeal was rejected on the grounds that the remarks by the Director of Personnel had not been libellous. On 11 May the complainant went to the Appeals Board. In a report dated 15 April 1995 the Board held that neither in letter nor in spirit had the Director's comments been libellous and it recommended rejecting the appeal. The Director-General endorsed the Board's recommendation in a letter of 12 June 1995, which the complainant is impugning.

B. The complainant submits that the libellous intent of the letter of 8 March is plain from the Director of Personnel's absence from the meeting of 5 October 1992. By confirming the letter on the Director-General's behalf the Assistant Director-General for Administration and Finance too was guilty of the libel.

Citing an FAO document headed "Standards of conduct of the international civil service", the complainant contends that strict observance of those standards required an apology from the Director of Personnel. The Director's comments are parcel of the psychological and mental warfare the Organization is waging against staff who dare assert their right of appeal.

He wants the Tribunal to grant him $8,000,001 in damages for libel. He claims reimbursement of the costs of publishing the Tribunal's judgment in four daily newspapers in America, four in Europe and four in Arab countries. He seeks the application of a penalty clause should the Organization fail to execute the Tribunal's decision within thirty days. He claims $6,000 in costs.

C. In its reply the FAO submits that the complaint is devoid of merit. How could there be libel when the Director's remarks were not disclosed to a third party? What the complainant is objecting to is a confidential letter that was sent to him and to no-one else. And it did not accuse him of anything; it was a straightforward statement of fact. Besides, by taking nearly a year after the interview of 5 October 1992 to raise the matter he acknowledged that there had been no offer of a post.

D. In his rejoinder the complainant points out that several officials got hold of copies of the supposedly "confidential" letter sent on 6 October 1992 by the Assistant Director-General. So even if the letter of 8 March 1994 had been marked confidential - and it was not - it was still libellous. He wants the Tribunal "not to hesitate" to raise its award of damages for breach of a duty "inherent in international loyalty to the whole United Nations family of organizations".

E. In its surrejoinder the FAO maintains that he got an offer of a new appointment neither at the meeting of 5 October 1992 nor at any other time. There was nothing offensive about the letter of 8 March 1994; nor was it any breach of confidence for others to get copies of the letter of 6 October 1992.

CONSIDERATIONS:

1. This dispute arises out of a meeting between the complainant and the Assistant Director of the Administrative Services Division. Though it is common ground that the meeting was in Rome on 5 October 1992, the parties differ over what was said, no-one else having been present. The complainant says that the Assistant Director promised him a continuing appointment on a P.4 post at headquarters and that he accepted.

2. There is no evidence before the Tribunal that he was ever made any such promise. On 6 October the Assistant Director sent him a letter summing up their talk. It began: "Yesterday morning, I had the possibility to discuss the matter with you in broad terms and what I write will be, to some extent, a repetition of what I said". The "matter" he referred to arose over a letter the complainant had sent to an official in the Division of Administrative Services. That letter, in the complainant's submission, was strictly personal and made no claims. In fact there is nothing in the Assistant Director's letter to suggest that they had discussed any offer of employment; nor did that letter prompt any comment from the complainant at the time. Not until 14 September 1993, almost a year later, did he first mention in writing - in a "personal" letter to someone else, with the grade of director - the meeting of 5 October 1992 and the alleged promise.

3. By a letter of 30 November 1993 to the Director of the Division of Administrative Services he claimed a continuing appointment on a P.4 post at headquarters in keeping with the promise he said the Assistant Director had made him 14 months earlier. The Director of the Division of Personnel answered him in a letter of 8 March 1994.

> "... the Assistant Director ... never offered any such transfer to you and would not have had the authority to bind the Organization in this regard in any case".

On 6 April 1994 the complainant appealed to the Director-General seeking compensation in the amount of 8,000,001 United States dollars for the libel he saw in the letter of 8 March.

4. There is no libel in the letter. Indeed the wording is perfectly suited to the purpose it was intended to serve. The complainant's claims therefore fail in their entirety.

5. Both the want of evidence to support the complainant's allegations and the absurdity of his claims show his complaint to be trifling and an abuse of process.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Julio Barberis, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

(Signed)

William Douglas Mella Carroll Julio Barberis

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FIRST SESSION

In re WASSEF (No. 14)

Judgment 1534

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourteenth complaint filed by Mr. Maher Nabih Wassef-Gerges against the Food and Agriculture Organization of the United Nations (FAO) on 1 August 1995, the FAO's reply of 8 January 1996 and the complainant's letter of 26 January 1996 to the Registrar saying that he did not want to rejoin;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to this case appear under A in Judgments 1401 and 1452. As Judgment 1452 states, the complainant lodged an appeal on 16 April 1994 with the Appeals Committee against the implied rejection by the FAO of his claim to compensation for the injury which he says the Organization caused him by failing to provide a panel of counsel to help him in internal appeal proceedings.

In its report of 15 April 1995 the Appeals Committee recommended rejection of his appeal.

The complainant wrote twice, on 7 and 27 June, to the Director of the Personnel Division asking him to provide the date of submission of the Appeals Committee's report to the Director-General. Having got no reply, he came on 1 August to the Tribunal. By a letter of 15 September 1995 the Director-General rejected his appeal.

B. The complainant submits that he exhausted the internal means of redress but that the Director-General failed to take the final decision in reasonable time. His complaint is therefore receivable.

Citing Appendix B to section 331 of the FAO Manual, he explains at length why, in his view, it is important to have a panel of staff able to help appellants. By failing to establish the panel the administration impaired his right to due process.

It was also in breach of Staff Rule 303.1321 which says that the Appeals Committee must start proceedings within two weeks.

He asks the Tribunal to declare that the FAO's internal means of redress are unlawful and the reports of the Appeals Committee unreliable. He seeks an award of 2 million United States dollars in damages and $6,000 in costs. He asks the Tribunal to order the FAO to reimburse him the cost of publishing the judgment in four American, four European and four Arab daily newspapers and to include in the judgment a penalty for failure to execute within thirty days of delivery.

C. The Organization replies that the complainant is not challenging a final decision. He failed to exhaust the internal means of redress, as is required by Article VII(1) of the Tribunal's Statute and paragraph 332.222 of the FAO Manual. He may not rely on Article VII(3) of the Statute, which applies only when there is no decision at all. The complainant went to the Tribunal before the Director-General had decided whether or not to endorse the Appeals Committee's recommendations. So the complaint is premature.

The defendant's pleas on the merits are subsidiary. It submits that the complaint is devoid of merit. The lack of a panel did not prevent the complainant from himself choosing a staff member to represent him before the Appeals Committee.

CONSIDERATIONS:

1. By a letter of 21 February 1994 the complainant asked the Director of the Division of Personnel to give him the list of officials on the "panel of counsel", set up in accordance with Appendix B to section 331 of the FAO Manual, who might represent a staff member with a case before the Appeals Committee. In a reply dated 3 March the Director told him that there was no such list "at present" but that in accordance with Staff Rule 303.136 he might appoint any staff member he chose to represent him before the Committee.

2. On 14 March 1994 he sent the Director-General a letter taking the FAO to task for failure to comply with the

provisions of the Manual and claiming 2 million dollars in compensation for "psychological stress, worries, preoccupations and deprivation of rights and privileges, and risks resulting from this non-observance of Regulations and Rules". In a letter of 3 May 1994 the Assistant Director-General in charge of Administration and Finance rejected his appeal on the Director-General's behalf. On 16 April, however, he had gone to the Appeals Committee. The Committee did not report until 15 April 1995 and the Director-General told him on 15 September 1995 that he had endorsed the Committee's recommendation and rejected the appeal. The complainant had already come to the Tribunal on 1 August 1995.

3. The FAO submits that his complaint is irreceivable because he has failed to exhaust his internal remedies. Though he filed before he got the final decision of 15 September 1995 the Committee took a whole year to come up with a three-page report and the Director-General another five months to let the complainant have a decision. Such delays are exorbitant and unpardonable. Under the circumstances the complainant was entitled to come straight to the Tribunal without waiting any longer for a reply from the Director-General. The objections to receivability fail.

4. The complainant's main claim is to payment of 2 million dollars in damages for injury he attributes to the Organization's failure to draw up a panel of counsel. There is a general principle of law that for such a claim to succeed the claimant must provide evidence of (i) an unlawful act, (ii) actual injury and (iii) a causal link between act and injury. Here the parties agree that the Organization failed to draw up the prescribed panel of counsel. The complainant sees therein breach of a duty in law. The FAO retorts that to discharge that duty it needed co-operation from the staff associations, which had to put forward names for the panel, and that since the associations consistently refused to name anyone the Organization may not be properly charged with breach of duty.

5. The Tribunal need not rule on the issue. The complainant does not support his claim with any evidence of injury. Injury is not to be presumed: mere mention of "worries", "psychological stress" and "deprivation of rights" will not do. Since his main claim therefore fails, so do his other claims which are corollary.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Julio Barberis, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

(Signed)

William Douglas Mella Carroll Julio Barberis

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL | INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF | *ADMINISTRATIVE TRIBUNAL*

EIGHTY-FIRST SESSION

In re WASSEF (No. 24) — Judgment 1535

THE ADMINISTRATIVE TRIBUNAL,

Considering the twenty-fourth complaint filed by Mr. Maher Nabih Wassef-Gerges against the Food and Agriculture Organization of the United Nations (FAO) on 23 November 1995;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 7 of its Rules;

Having examined the written submissions;

CONSIDERATIONS:

1. The complainant is asking the Tribunal to rule on the liability of several senior officers of the defendant Organization, whom he names, and to award him 10 million United States dollars in damages for its condoning their "wrongdoings". In his brief he makes unsupported allegations of misconduct against those officers and explains why he wants proceedings to be brought and punishments to be imposed on them.

2. Article II(5) of the Tribunal's Statute confers competence to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations of the defendant Organization. The matters the complainant raises do not fall within the Tribunal's competence. So his complaint must be summarily dismissed in accordance with Article 7 of the Rules as clearly irreceivable.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

Wm Douglas
William Douglas

Mella Carroll
Mella Carroll

Mark Fernando

A.B. Gardner
A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

EIGHTY-FIRST SESSION

In re RAOOF

Judgment 1536

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Abdul Raoof against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 14 November 1994 and corrected on 29 September 1995, the Organization's reply of 8 November 1995, the complainant's rejoinder of 7 February 1996 and UNESCO's surrejoinder of 21 March 1996;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a citizen of India who was born in 1923, retired on 30 June 1985 after spending over 15 years with UNESCO, all in field service. His last duty station, where he served from November 1976, was Samchi, in Bhutan and by then he was at step 4 in grade D.1.

He was a participant in the Organization's Medical Benefits Fund. The Fund's Rules provide that a staff member who retires at or after the age of 55 with at least ten years' participation in the Fund may retain coverage for himself and his dependants as "associate" participants. Article 5.3 of the Rules requires the participant to apply for such status within three months of the date of retirement.

By a letter of 20 May 1987 to the health insurance unit the complainant applied for continuing coverage, offering to pay any amounts he might owe by way of premium since July 1985. In a reply dated 9 July 1987 the Chief of the Staff Pensions and Insurance Division said he was referring the matter to the Fund's Board of Management.

In a letter dated 26 July 1987 the complainant told the Chief of the Division that he had not learned until mid-May of the possibility of after-service coverage and he asked for special treatment on compassionate grounds.

By a letter of 29 December 1988 the Chief of the Division informed him that the Board of Management had rejected his application as time-barred.

The complainant sought review but the Secretary of the Board told him in a letter of 10 October 1990 that the Board had again rejected his request.

In a letter of 26 November 1990 he appealed to the Director-General. The Director of the Bureau of Personnel told him on the Director-General's behalf in a letter of 10 January 1991 that he was not competent to decide such matters.

On 2 March 1991 the complainant gave the Appeals Board notice of appeal. In a report of 11 June 1992 the majority recommended inviting the Board of Management to reconsider.

By a letter of 20 July 1992 the Director-General informed the complainant that at the Appeals Board's recommendation he was sending the case back to the Board of Management for "reconsideration".

In a letter of 28 October 1992 the Secretary of the Board of Management informed him that it upheld its earlier decision.

By a letter of 29 November 1992 the complainant appealed anew to the Director-General and sought leave to put his case to the Tribunal in the event of rejection.

The Director of Personnel told him in a letter of 18 January 1993 that the Director-General lacked competence as to decisions by the Board of Management and saw "no need ... to take any decision" on his application for waiver of the internal appeals procedure.

On 15 April 1993 he filed another appeal seeking action on the majority recommendation of 11 June 1992.

In a further report dated 13 June 1994 from the Appeals Board the majority recommended rejecting his appeal but amending the Fund's rule on the time limit.

By a letter of 12 August 1994 the Director-General rejected his appeal as "inadmissible" and devoid of merit "in law or on the facts". That is the decision under challenge.

B. The complainant submits that the Director-General's decision shows mistakes of law and fact.

Citing the case of another retired official who had applied, but successfully, for readmission to the Fund as an associate participant after expiry of the time limit in Article 5.3 of the Rules, he alleges that the Organization has authority to extend or waive the time limit and has discriminated against him in refusing to do so.

He pleads neglect of essential facts. Stranded at a remote duty station, he relied on wrong information UNESCO had given him earlier that he could not stay in the Fund for more than six months after retirement. But as soon as he learned he might have the status of associate participant he applied for it.

He seeks the quashing of the decision of 12 August 1994, readmission to the Medical Benefits Fund as an associate participant and costs.

C. In its reply UNESCO argues that the complaint is irreceivable *ratione temporis*. Since the complaint raises the same issues as his first internal appeal, the time limit in Article VII(2) of the Tribunal's Statute began at the date when he received the Director-General's letter of 20 July 1992 or, at the latest, when he got the letter of 28 October 1992 from the Secretary of the Board of Management telling him that the Board had "upheld the time-limit".

On the merits the Organization points out that by implication the Fund's Rules do not allow waiver or extension of the time limit in Article 5.3. That the Board wrongly made an exception in another case confers no right on the complainant.

UNESCO met its duty to inform him of the material rules by sending them to him at the time of recruitment. Besides, his acknowledgement in his letter of 20 May 1987 that he "forgot" to apply for continuing coverage shows that he already knew that he ought to have applied sooner.

D. In his rejoinder the complainant seeks to refute UNESCO's pleas in its reply. Although UNESCO sent him the Rules of the Fund in 1976 among some 16 annexes to a letter of appointment it was unfair to expect him still to have them to hand after spending many years in far-flung places. He presses his claims.

E. In its surrejoinder UNESCO enlarges on the pleas in its reply.

CONSIDERATIONS:

1. The complainant joined the staff of UNESCO on 10 October 1970 and, apart from a break of 10 months in 1976, served until 30 June 1985, when he retired.

2. Under Article 5.3 of the Rules of the Medical Benefits Fund he had the option of applying for admission to the Fund as an associate participant within three months of

separation from service. He did not then exercise the option. Not until 20 May 1987 did he write a letter applying for admission, saying that he had forgotten to apply in time. The Board of Management refused his application on the grounds that it was late and so informed him by a letter dated 29 December 1988.

3. After he had made further requests and received further explanations the Board agreed to reconsider his case and did so on 4 October 1990. But, having again decided to reject his application, it so informed him by a letter dated 10 October 1990.

4. By a letter of 26 November 1990 he asked the Director-General of the Organization in accordance with paragraph 7(a) of the Statutes of the Appeals Board to review the Board of Management's decision. The Director of the Bureau of Personnel replied on 10 January 1991 that it was not within the Director-General's competence to decide on an application for admission to the Fund, let alone overrule a decision by the Board of Management; according to Article 22.3 of the Rules of the Fund sole responsibility lay with the Board.

5. On 2 March 1991 the complainant filed appeal with the Appeals Board. In its report of 11 June 1991 the Board held by a majority that the Board of Management had treated inconsistently the complainant's case and another similar one; it suggested that the Director-General invite the Board of Management to reconsider, on the grounds that that would "only be consistent with equity and equality of treatment". The case that the majority of the Appeals Board cited by way of comparison was that of another retired official, who was three months late in applying but whom the Board of Management admitted as an associate participant nevertheless.

6. The Director-General put the majority opinion to the Board of Management so that it might reconsider the complainant's case, and the Board duly did so. It cited the express rule that no application "shall be receivable" beyond the time limit, observed that there was no provision for waiver and that the rule had been strictly applied except in the one case, a wrong precedent not to be followed; confirmed its decision; and so informed the complainant by a letter of 28 October 1992.

7. By a letter dated 29 November 1992 the complainant asked the Director-General to review the decision in that letter or else give him leave under Staff Rule 111.2(b) to appeal directly to the Tribunal on the grounds that further review by the Appeals Board would serve little purpose.

8. By a letter of 18 January 1993 the Director of Personnel informed the complainant on the Director-General's behalf that applications for admission to the Fund and changes in decisions by the Board of Management were not within his

competence. The Director-General did not - the letter went on - grant leave for direct appeal to the Tribunal: "all relevant elements of your case considered, there is no need for him to take any decision on that request".

9. On 15 April 1993 the complainant appealed again to the Appeals Board, this time claiming entitlement to action on the majority recommendation of 11 June 1992. He said that the recommendation, having been accepted by the Director-General, was binding on all administrative bodies of the Organization; that the Board of Management had no authority to question the Appeals Board's conclusions; and that it was under a legal obligation to act on the recommendation and admit the complainant as an associate participant.

10. The Appeals Board reported on 13 June 1994. It rejected his contention that the earlier recommendation by the majority that the Board of Management reconsider his case meant revision in his favour. All that the Board of Management had to do was take into account all the circumstances and come to a decision, which might be yes or no. In the event the Board had said no and explained why. The Appeals Board did feel that there should be no compulsory rule that allowed of no derogation and that left no discretion to the Board of Management, and it recommended amending Article 5.3 accordingly. But by a majority it recommended dismissing the complainant's appeal. The Director-General did so by a letter to him of 12 August 1994 on the grounds that his appeal was both inadmissible and devoid of merit in law and on the facts. That is the decision he is impugning in this complaint, which he lodged on 14 November 1994.

Receivability

11. The Organization pleads that the complaint is irreceivable on the grounds that it is in substance identical to his first appeal to the Appeals Board. The decision that the Director-General took on the Board's majority recommendation of 11 June 1992 was in the letter of 20 July 1992. So the limit of ninety days set in Article VII(2) of the Tribunal's Statute for filing a complaint began at the date of notification of that decision, or at the latest of the confirmation of its decision by the Board of Management in the letter of 28 October 1992. The Organization argues that if the complainant was dissatisfied with any decision taken on his first appeal his remedy was to lodge a complaint in time with the Tribunal.

12. The Organization is mistaken. The complainant had no fault to find with the Appeals Board's majority recommendation of 11 June 1992, which the Director-General endorsed, and could not be expected to lodge a complaint against a decision by the Director-General that was in his favour. His second appeal did

not raise the same issues as had his first. The relief he was seeking, namely admission to the Fund as an associate participant, was no doubt the same, but his arguments were different and raised a new issue: was the Board of Management bound to act on the majority recommendation accepted by the Director-General?

13. Since the Director-General did not give leave for direct appeal to the Tribunal the complainant had no choice but to go through the internal appeal procedure yet again and so get the final decision of 12 August 1994 he is now impugning. The defendant does not contend that he filed this complaint over ninety days after the date at which he received its letter of that date. The conclusion is that the complaint is receivable.

The merits

14. Article 5.3 of the Fund's Rules reads:

> "A retired member ... who opts for admission to the Fund as an associate participant must request such admission on separation. No application shall be receivable beyond three months from that date ..."

The complainant addresses two issues:

(1) whether the Board of Management has discretion to allow an exception to Article 5.3 of the Rules of the Fund; and

(2) if so, whether it exercised that discretion properly in his own case.

He gives an account of the case of the other retired official mentioned in 5 above. In September 1989, he says, the Board rejected that other official's application for waiver of the time limit, but in February 1990 it agreed to reconsider and granted waiver after all. He argues that the Board of Management thereby recognised it might waive the time limit in Article 5.3 and he claims equality of treatment. In the complainant's submission the recommendation by the majority of the Appeals Board could mean only that the Board of Management should reverse its original decision. But it is immaterial whether that is so or the Appeals Board was right to think that the Board of Management could decide either way: what matters for the purpose of his argument is that the Appeals Board allowed the possibility of admitting him to associate participation. By accepting the recommendation the Director-General too recognised implicitly that the Board of Management had that power. He does not say that Article 5.3 is obsolete; merely that the Board of Management recognised it had the right in certain circumstances to waive the time limit.

15. The text of 5.3 does not allow of any exception. Even if it did, the complainant could not properly argue that his own case is exceptional. He twice received copies of the Fund's Rules, in 1970 and again in 1976, and the Organization was under no duty to draw any particular provision to his notice. That is a principle that the Tribunal affirmed in Judgment 167 (in re Taylor Ungaro) under 3.

16. The answer to the complainant's plea of breach of equality is that the admission of the other retired official as an associate participant was a wrong decision. It should not be followed, and the Board of Management was right to refuse to follow it. Equality of treatment means equality in the observance of the law, not in the breach of it.

17. The recommendation by the majority of the Appeals Board on the complainant's first appeal was explained in the Board's report on the second one: the Board of Management was supposed to look at the case again and reach a decision, whatever that decision might be. It is immaterial whether the Appeals Board or the Director-General believed that the Board of Management had the power to waive the time limit: the Board lacks such power because the wording of Article 5.3 excludes it. That being so, the second issue that the complainant raises is not material.

18. Lastly, the complainant pleads that there was a procedural irregularity in that a representative of the Director-General attended the meeting that the Board of Management held on 7 October 1992. The material issue in this case is the refusal by the Board of Management, not by the Director-General, to admit the complainant to associate participation on the strength of its interpretation of the Article. That is an issue that has been fully argued before the Tribunal. The attendance of the Director-General's representative at the Board's meeting was not a material factor and did not lead to any miscarriage of justice. The plea therefore fails.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

Wm Douglas
William Douglas

Mella Carroll
Mella Carroll

Mark Fernando

A.B. Gardner
A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL | INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF | ADMINISTRATIVE TRIBUNAL

EIGHTY-FIRST SESSION

In re GROSSE WIESMANN

Judgment 1537

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Paul Grosse Wiesmann against the European Organization for Nuclear Research (CERN) on 14 July 1994, CERN's reply of 19 October, the complainant's rejoinder of 31 October 1995 and the Organization's surrejoinder of 31 January 1996;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. At the material time Article R II 6.02 of CERN's Staff Regulations said:

> "A fixed-term or a term contract shall expire at the end of the prescribed period. The Director-General may renew it or not, or extend it; his decision shall be notified to the member of the personnel at least six months before the date of expiry, if the contract is of sufficient duration. Not less than three months before the said date of expiry, the member of the personnel shall inform the Director-General whether or not he accepts the new contract."

The complainant, a German born in 1952, joined CERN on 1 April 1989 under a three-year fixed-term appointment as a physicist at grade 9. His duties consisted mainly of work on an experiment known as OPAL. In an electronic ("E-mail") message of 19 March 1990 headed "Second probation for Paul Grosse Wiesmann" the leader of his group advised the leader of the division to which the group belonged to release him from OPAL on the grounds that he had produced no tangible results.

From 1 June 1990 CERN assigned him to another experiment, known as DELPHI. By an E-mail message of 8 August 1991 his supervisor told the division leader that his participation had "reached a reasonable level".

By a letter dated 30 September 1991 the Leader of the Personnel Division gave him a six-month extension of contract until 30 September 1992 and said his letter should serve as the notice of non-renewal required under Article R II 6.02 of the Staff Regulations.

In a letter of 23 September 1992 the deputy Leader of the Experimental Physics Division (PPE) said that the Administration was willing to hold over the date of termination by three months and that, provided the complainant supplied "written evidence of alternative employment" and his performance was satisfactory from October to December 1992, the Administration would consider a "further and final" extension until 30 April 1993.

The complainant having informed the Administration that he would have a job in the United States from May to July 1993, the Leader of the Personnel Division announced in a letter to him of 22 December 1992 that he would have his contract extended until 30 April 1993, saying it was the last CERN could offer him.

By a letter of 30 June 1993 he asked the Director-General for "a new term contract" from 1 May 1993 to 31 August 1994. On 7 July 1993 CERN gave him a contract for 16 months as from 1 May 1993 as a physicist at grade 10. Although he took up the position, he failed to sign the contract, which stipulated that the "post is established for a limited duration ... and will not be renewed or extended". The contract also said that it "assumed" that he had exhausted any annual leave entitlement accrued as at 30 June 1993.

In a letter of 21 December 1993 the Director of Administration gave him under Article R II 6.02 notice on the Director-General's behalf of the expiry of his appointment at 31 August 1994.

In a letter of 30 January 1994 to the Director he challenged that decision and the terms of the contract dated 7 July 1993, the text of which he said CERN had not sent to him until 7 December.

By a letter of 6 April 1994 he told the Director he wanted the Director-General to review his case. In a reply dated 14 April 1994, which he impugns, the Director-General said there were no grounds for reviewing the terms of his contract and that the date of expiry, 31 August 1994, held good.

B. The complainant submits that since he never waived the rights he enjoyed under his original contract neither the termination nor the loss of his entitlement to leave was lawful. The basis for the decision to terminate was a so-called "second probation report", which the Administration secretly put in his personal file and which contained unsubstantiated charges he got no opportunity to refute.

He asks the Tribunal to clarify his status, order the removal of offensive documents from his file, safeguard his entitlement to annual leave and award him damages.

C. In its reply CERN contends that his complaint is irreceivable on several grounds. The letter he is challenging was not a "decision" within the meaning of Article VII of the Tribunal's Statute; appeal against the decision of 21 December 1993 was time-barred; and his claims were unclear. As for his claims to the removal of documents from his personal file and to leave entitlement, he has failed to exhaust his internal remedies.

In subsidiary argument on the merits the Organization observes that the complainant accepted the terms of the contract it offered him on 7 July 1993 and got due notice of non-renewal.

D. In his rejoinder the complainant seeks to refutes CERN's arguments on receivability: not until 7 December 1993 did he get a copy of the contract dated 7 July 1993, and not until 10 January 1994 the decision of 21 December 1993. His challenge to both in the letter of 30 January 1994 was timely, as is his complaint to the Tribunal.

He enlarges on the merits, pointing out that CERN may not rely on Article R II 1.16 in support of its allegation that he tacitly accepted the change in his status since he had not seen the new terms until five months after CERN deemed them to apply.

E. In its surrejoinder the Organization answers the complainant's submissions on receivability and describes his pleas on the merits as "baseless".

CONSIDERATIONS:

1. CERN first employed the complainant under a contract, which he signed on 29 November 1988, for a period of three years from 1 April 1989. By a letter dated 30 September 1991 the Leader of the Personnel Division told him that his contract was extended by six months, to 30 September 1992, and would not be further renewed. But a letter of 23 September 1992 from the deputy Leader of the Experimental Physics Division (PPE), in which he was employed, informed him that at his request his appointment was extended to 31 December 1992 and that "a further and final shift" of the date of his departure until 30 April 1993 could be considered provided he produced "written evidence of alternative employment" and a satisfactory report on his performance from October to December 1992.

2. By a letter of 18 December 1992 he informed the deputy Leader of the PPE Division that he intended to accept an offer of a temporary position he would be taking up at a university in the United States in May 1993. By a letter dated 22 December 1992 the Leader of the Personnel Division told him that he would get one last extension of contract to 30 April 1993: "no further extension", the Leader warned, "will be possible". His fixed-term appointment accordingly expired at that date.

3. He nevertheless offered to work for CERN on a temporary project in what is known as the LEP Polarisation Group and by a letter of 30 June 1993 asked the Director-General to grant him "a new term contract" covering the duration of that project, from 1 May 1993 to 31 August 1994, and requiring "a new recruitment authorization by the Director-General". On 7 July 1993 the Organization issued a new contract for a period of 16 months as from 1 May 1993 and up to 31 August 1994. The contract stated: "The post is established for a limited duration ... and will not be renewed or extended". Although the complainant took up employment he did not sign the contract. He says he did not get a copy until 7 December 1993; the Organization maintains that it was "issued" in July 1993.

4. By a letter dated 21 December 1993 the Director of Administration informed him that his contract would "not be renewed or extended" and said he was thereby given the notice of non-renewal required by Article R II 6.02 of the Staff Regulations, which is six months.

5. Under Staff Rule VI 1.02 there is no right of internal appeal against a decision not to renew a contract, but under Rule VI 1.05 there is a right of appeal to the Tribunal. The complainant did not appeal to the Tribunal either against

the decision of 22 December 1992 mentioned in 2 above or against the decision of 21 December 1993 referred to in 4 above.

6. In a letter dated 30 January 1994 to the Director of Administration he said that he could not accept what the Director had said in his letter of 21 December 1993. In a letter of 6 April 1994 to the Director he raised the question of his contractual relationship with the Organization, argued that the contract he had signed with CERN on 29 November 1988 had never been terminated, and referred to a probation report which he said had been "illegally" entered in his personal file.

7. The Director-General replied on 14 April 1994 stating that there was no reason to reopen the question of the length of his contract, which was to end at 31 August 1994, and that he had given explicit delegation of authority to the Director of Administration and to the Leader of the Personnel Division to deal with matters concerning his relationship with the Organization.

8. That is the decision that the complainant identifies as the one he is impugning, and the relief he seeks from the Tribunal is that it -

(1) "clarify" his "contractual status at CERN";

(2) "order the removal of documents with unsubstantiated negative allegations from his personnel file";

(3) "regulate the damage caused by CERN"; and

(4) "protect" his "vacation leave claims."

In his rejoinder he explains that what he claims under (1) is a ruling as to whether his contract was lawfully terminated at 31 August 1994.

9. The Organization pleads that its decision of 14 April 1994 was mere confirmation of the one of 21 December 1993 and that because the complainant failed to file a complaint with the Tribunal within the time limit, set in Article VII(2) of its Statute, of ninety days from the date of notification of 21 December 1993 any objection to the decision not to extend his contract beyond 31 August 1994 is time-barred.

10. The plea succeeds. Confirmation of a decision does not set off a new time limit for action. So the decision that adversely affected the complainant and that he ought to have challenged was the one of 21 December 1993. Having failed to appeal against it to the Tribunal within the prescribed time

limit of ninety days, he is barred from challenging the non-renewal in the present complaint.

11. He argues that he never agreed to the terms of the contract dated 7 July 1993, that he refused to sign it and that he continued to be employed under the contract he had signed on 29 November 1988.

12. Insofar as he is arguing that he continued to be employed under the contract he had signed on 29 November 1988 the claim is long since time-barred. Since he failed to appeal to the Tribunal within the ninety days against the decision of 22 December 1992 not to renew that contract any claim to its continuance is out of time.

13. Lastly, his claims to "the removal of documents" from his personal file and to "vacation leave" are irreceivable under Article VII(1) of the Tribunal's Statute because he failed to file any internal appeal and so to exhaust the means of redress available to him within the Organization.

14. Since his other claims fail the question of his entitlement to damages does not arise.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

Wm Douglas
William Douglas

Mella Carroll
Mella Carroll

Mark Fernando

A.B. Gardner
A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL

TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION

ADMINISTRATIVE TRIBUNAL

EIGHTY-FIRST SESSION

In re GROSSE WIESMANN (No. 2) Judgment 1538

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Paul Grosse Wiesmann against the European Organization for Nuclear Research (CERN) on 22 March 1995, CERN's reply of 11 July, the complainant's rejoinder of 8 September and the Organization's surrejoinder of 16 October 1995;

Considering Articles II, paragraph 5, and VII, paragraph 3, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to this case are set out, under A in Judgment 1537 on Mr. Grosse Wiesmann's first complaint. This one is about his entitlement to unemployment benefits under Article V 1.01 of CERN's Staff Rules, which at the material time said that "A social security scheme shall safeguard: a) the members of the personnel against the economic consequences of unemployment and old age ..." and administrative circular 4 (rev. 3) of October 1993, which lays down the conditions for payment of unemployment benefits to staff after termination.

On 31 August 1994 CERN terminated the complainant's appointment. On a form headed "Expenses claim" which he submitted to the Organization on 1 December 1994 he sought payment of unemployment insurance benefits for September, October and November of that year. In a letter of 9 March 1995 the Director of Administration told him that CERN could not entertain his claim until he had met his obligations towards the authorities of France, where he was resident.

By a letter dated 14 March 1995 the complainant protested to the Director-General against the withholding of benefits due to him and said he had no problems with the French customs.

He is impugning the rejection he infers from the Administration's failure to answer his claim of 1 December 1994.

B. The complainant submits that CERN's failure to pay him unemployment benefits is unlawful. He observes that since he has met all the requirements of the rules neither his dispute with it over the nature of his appointment nor the completion of customs formalities warrants any delay in payment.

He wants the Tribunal to order CERN to pay him for the months of September, October and November 1994 19,440 Swiss francs by way of unemployment insurance benefit, 2,595 francs in premiums for health insurance, 828 in family allowance and 1,824 in child allowances, plus interest on all those sums as from the due dates. He claims moral damages and costs.

C. In its reply the Organization submits that the complaint is devoid of merit. Payment of termination indemnities and unemployment benefits is subject to the completion of end-of-service formalities. Since the complainant has refused to comply with instructions in a document headed "When you leave CERN", his claim to the termination indemnities is premature; and according to circular 4, unemployment insurance benefits are not payable before termination indemnities.

In any event his failure to comply with the rules on the registration of vehicles in France is in breach of Articles I 3.04 and I 3.05 of the Staff Rules, which in the Organization's own interest require officials to comply with national law.

D. In his rejoinder the complainant seeks to shed light on the facts and describes his efforts to meet his obligations towards the French authorities.

E. In its surrejoinder CERN disputes the complainant's version of the facts and presses its earlier pleas.

CONSIDERATIONS:

1. CERN employed the complainant on a fixed-term contract for three years from 1 April 1989. It renewed his contract twice, up to 30 April 1993. On 7 July 1993 it granted him a term contract for sixteen months, from 1 May 1993 to 31 August 1994. By a letter dated 21 December 1993 the Director of Administration of CERN gave him notice that that contract would not be renewed or extended. In his first complaint he contests unsuccessfully both the terms of the contract and the decision not to renew it.

2. By a letter of 20 May 1994 the Leader of the Personnel Division sent him a "termination check sheet" and asked him to complete "the formalities indicated before leaving the Organization so that clearance may be given authorizing final pay action".

3. After the expiry of his contract he submitted to the Organization monthly attestations of unemployment. In a letter of 27 October 1994 the Director of Administration pointed out to him that "with regard to entitlement to unemployment benefits" he had been "informed on several occasions" that he "must first comply with all the required termination formalities (e.g. returning all issued documents, car plates etc.)".

4. A letter of 5 October 1994 to him from Personnel Administration had contained the same information. Though sent to him by registered post, it was returned to the Organization, the complainant not having collected it. The reason why the letter was not delivered is immaterial because in any event the letter of 27 October 1994 told him what to do to get payment.

5. On 1 December 1994 he submitted an "Expenses claim" form to CERN. He claimed payment of 19,440 Swiss francs in unemployment insurance benefit for September, October and November 1994, 2,595 francs to pay for health insurance coverage, 828 francs in family allowance and 1,824 francs in allowances for two children for the same period, making a total of 24,687 francs.

6. More than sixty days having elapsed before he received the reply dated 9 March 1995 from the Director of Administration, he was free to appeal directly to the Tribunal against implied rejection under Article VII(3) of the Tribunal's Statute. He lodged this complaint on 22 March 1995, claiming payment of the 24,687 Swiss francs, plus interest, and awards of damages for moral injury and costs.

7. The Director's letter of 9 March again informed him, as to his claim to unemployment benefits, that he "must first

settle the issue of [his] car registration plates with the French customs" and that CERN had "not yet been given clearance by the authorities".

8. The French authorities had given the complainant green K-series licence plates of the kind that they issue for vehicles of members of CERN staff who have international status in France. In mid-March 1995 he discovered that the serial number of his motor car had been wrongly registered in France. Though the French customs attested on 23 March that his car had been re-exported to Germany, they informed CERN that he had not yet returned the licence plates and that his file therefore still remained open. On 15 May he told CERN officials orally that he had lost the licence plates somewhere in Germany. The Organization did not hear directly from him thereafter. It suggested to the French customs relieving him of the requirement that he hand in the plates. The answer from the French customs was that they would accept a written declaration from him of loss of the plates and evidence that his car had been re-registered in Germany. CERN so informed his counsel on 19 June. Shortly thereafter his counsel informed the Organization orally that he was unwilling to provide any further written statement on the matter. In June 1995 the competent office of vehicle registration in France corrected the serial number of his car; he completed the formalities in Germany on 4 July; and the French registration of his car was cancelled on 13 July.

9. On 11 July 1995, the day on which CERN filed its reply to his complaint, the Leader of its Personnel Division wrote a letter to his counsel to say that it would let him have "by means of advance payment only, part of the amount which will be due to him by the Organization once he has finally completed the termination formalities, whilst retaining the remaining part until the date of such completion". It paid him 50,000 Swiss francs on 10 August and 12,091 francs on 28 August 1995.

10. The complainant says in his rejoinder that he understood from the "termination check sheet" that the removal of his personal belongings and the formalities over his car licence plates were to be completed within two years of his leaving the Organization, and he cites in support Regulation R IV 1.42 of the Staff Regulations as in force at the material time. On that score he is, as CERN points out, mistaken: Regulation R IV 1.42 relates only to the time limit for the payment of removal expenses.

11. He observes that for eleven months he had no income and he submits that CERN's attitude was disproportionately strict, not to say untenable. The Organization retorts that the payment of end-of-service indemnities depends on the

employee's completing the formalities of termination and that the payment of unemployment benefits is subject to prior payment by the Organization of such indemnities: it cites Article R V 1.01 of the Staff Regulations and paragraph 5 of administrative circular 4 of October 1993. It further observes that it did make payments to the complainant from the date of his departure until April 1995, when he stopped letting the Organization have documents in support of his claims. It says that by consistently refusing to execute his obligations in regard to the registration of his motor car he caused trouble to the Organization, which has a duty to co-operate with the host States, France and Switzerland. It quotes Article XVIII of the Agreement it concluded with France on 16 June 1972, which reads:

> "The Organization shall co-operate with the competent French authorities in order to facilitate the proper administration of justice ... and avoid any abuse in connection with the immunities and facilities provided for by the present Agreement.

12. The Organization was right to treat seriously the complainant's failure to deal with the matter of the licence plates: it has a duty to ensure the strict observance of obligations towards the governments of the host countries. The matter of the plates was not sorted out until 13 July 1995, while the case was pending before the Tribunal. The Organization had, however, agreed on 11 July to pay in advance part of the entitlements that had accrued, and it actually paid within a reasonable time far more than the amount the complainant has claimed. In the circumstances its actions cannot be faulted. No question of payment of interest arises: no payment was due in law until the complainant had completed the formalities of termination. The conclusion is that the complaint must fail in its entirety.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

Wm Douglas
William Douglas

Mella Carroll
Mella Carroll

Mark Fernando

A.B. Gardner
A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL

Registry's translation of the dissenting opinion, the French text of that opinion being authoritative.

EIGHTY-FIRST SESSION

In re DEAKIN

Judgment 1539

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Lorraine Deakin against the European Free Trade Association (EFTA) on 7 November 1994 and corrected on 9 December 1994, EFTA's reply of 10 February 1995, the complainant's rejoinder of 17 March, the Association's letter of 27 March informing the Registrar that it would not be submitting a surrejoinder, and the further submissions communicated by EFTA on 28 November 1995 and the letter of 5 February 1996 from the complainant informing the Registrar she did not wish to make further comments;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, who is British, was employed by EFTA from November 1988 to May 1991 as a secretary at grade G.4 in its Trade Policy Affairs unit at headquarters in Geneva. She had local status. Learning that her post was to be transferred to the Association's office in Brussels, she had discussions in December 1992 with several officials about applying for it. At the time she was resident at Nyon, a few miles from Geneva, in the Canton of Vaud, in Switzerland.

In a memorandum of 16 December 1992 to the Deputy Secretary-General the Senior Personnel Officer suggested offering her the post, pointing out that she would be "willing to move to Brussels at short notice and on the basis of a local contract". The Deputy Secretary-General approved the appointment and by a memorandum of 17 December, of which she got a copy, the Senior Personnel Officer informed the Finance Office that she would be recruited locally. On 18 December she signed a letter of appointment, the period of the contract to be one year. The letter made no reference to her contractual status, but said that any modification of the allowances to which she was entitled under the Staff Regulations and Rules would be notified to her separately and in writing. She took up the post on 15 January 1993.

By a memorandum of 18 June 1993 she and two other staff members belonging to the General Service category asked the Secretary-General to grant them non-local status.

On 20 August she signed a further contract for one year, in substance the same as the first.

By a letter of 30 September 1993 the Secretary-General rejected her request of 18 June. By a memorandum of 16 February 1994 she asked him to reconsider on the grounds that since 30 September one of the two other staff members had been given some of the benefits of non-local status on the recommendation of EFTA's Advisory Board. By a letter of 31 March 1994 the Secretary-General replied that he was unable to grant her such status; her case was not on all fours with that of her colleague, who had not been clearly told that, though till then her status had been non-local, she was to be recruited locally for the appointment in Brussels.

By a memorandum of 12 April 1994 she referred the matter to the Advisory Board under Regulation 40, asking for the retroactive grant of non-local status, for installation allowance, and for repayment of the costs of removal and travel. In its report of 9 June the Advisory Board recommended rejecting her claims. It held that on signing the letter of appointment she had known full well that recruitment would be local. It did not say whether or not she had had a copy of the memorandum of 17 December 1992, but it suggested that to avoid dispute in future, a letter of appointment should mention status. By a letter of 15 September 1994 - the impugned decision - the Deputy Secretary-General rejected the complainant's appeal on the Secretary-General's behalf.

B. The complainant points out that the letter appointing her did not state that she was to be recruited locally. She never received her copy of the memorandum of 17 December 1992. Besides, benefits or allowances may not be withheld on the strength of a separate written communication. For one thing, payment of allowances is made directly under the Staff Regulations and Rules and requires no separate communication. For another, to admit the Association's argument would be to let it waive the rules, which it may not do here since they form part of the contract. There are criteria in the Regulations for determining status and the Secretary-General does not have discretion to refuse non-local status on recruitment.

The Association's sole reason for refusing the benefits she claims is her alleged concurrence in local status. She submits that, even were the Tribunal to accept the plea, her entitlement to the benefits would not be affected since payment of them is not contingent on non-local recruitment.

She seeks payment of the non-residence allowance under Regulation 16 from the date of her appointment, installation allowance in accordance with Regulation 19, repayment of the costs of travel to Brussels under Regulation 24 in the amount of 220 Swiss francs, and repayment of the costs of removal under Regulation 26 in the amount of 1,864 francs.

C. In its reply EFTA submits that when the complainant signed the two letters of appointment she knew full well that she was being recruited locally since the Senior Personnel Officer had told her so. It is "not likely" that she got no copy of the memorandum of 17 December 1992 "since the Finance Office did receive it". Her persistent attempts to get non-local status show that she knew that she had not been granted it.

It has long been EFTA's policy to recruit General Service staff locally unless it needs special skills for which non-local recruitment must be considered. Even when the conditions for non-local status are met - such as the geographical requirements - it may still grant local status. That is borne out by Rule 24.5.1, which defines the designated home station of a staff member "who is considered as having been non-locally recruited": the Rule does not have to be applied to every staff member who meets the geographical requirements.

Where the Regulations or Rules allow a choice, as they did here, and the Association and prospective employee agree on one of the options, EFTA may set out the conditions so agreed in a distinct text. It may not of course thereby introduce any it likes, their purpose being to make the terms of employment quite explicit.

D. In her rejoinder the complainant maintains her own version of the facts and presses her pleas. She says she never got a copy of the memorandum of 17 December 1992 and the Association cannot show that she did or acquiesced in local status. The Senior Personnel Officer seems to have misunderstood that she was willing to accept such status.

CONSIDERATIONS:

1. The complainant Worked for the European Free Trade Association (EFTA) at its headquarters in Geneva from 1988 to 1991. The Association employed her as a secretary at grade G.4, step IV, under a letter of appointment for one year from 15 January 1993 at its office in Brussels. She signed the contract on 18 December 1992 at Geneva. At the time she was living at Nyon, in the Canton of Vaud, in Switzerland. On 20 August 1993 she signed a second letter of appointment at grade G.4, step V, for one year from 15 January 1994. She contends that she was not locally recruited and claims additional allowances and benefits which pertain to non-local status and which she says that the Association has wrongfully withheld from her.

2. Regulations 12, 16 and 37 of the Association's Staff Regulations read:

> "12. The appointment of a staff member shall take the form of the signing of a contract between him and the Association. The Secretary-General, or the Deputy Secretary-General, shall sign for the Association. The contract shall set out, inter alia, the terms and conditions attaching to the appointment and provide that these regulations form an integral part of the contract."
>
> "16. A staff member in the General Service category shall receive a non-resident allowance except when recruited locally."
>
> "37. The Secretary-General may, in the case of a staff member assigned to a duty station outside Geneva, apply such modifications to the Staff Regulations as he deems desirable to meet local conditions and in conformity with the prevailing practice of other international organizations in the same location."

3. In compliance with Regulation 12 both the letters of appointment that the complainant signed stipulated that her

appointment was "in accordance with the terms and conditions specified" therein and "subject to the provisions of the Staff Regulations and Rules", which formed part of the conditions of service. Clause 7 of each letter was headed "Special conditions" and read:

> "The conditions of employment in Brussels may in accordance with Staff Regulation 37 be modified to meet local conditions and in conformity with the prevailing practice of other international organizations. The employment conditions for Brussels have been specified in EFTA/ON 2/89."

Circular EFTA/ON 2/89 said under 2:

> "The salaries and allowances for EFTA staff based in Brussels shall be ten per cent lower than those of the EFTA staff in Geneva. The salaries and allowances of EFTA staff in Brussels shall be adjusted in accordance with the Geneva scales applied for salaries and allowances."

4. The first letter of appointment - the one she signed on 18 December 1992 - further stipulated in clause 6:

> "Any future changes in the terms and conditions of employment and any modifications of your statutory entitlements shall be notified to you in writing."

5. Both letters of appointment gave the amount of "Salary" and contained a clause, numbered 2 and headed "Allowances", which read:

> "The salary ... does not include any allowances to which you may be entitled under the Staff Regulations and Rules. They will be communicated to you separately and in writing."

6. The complainant claimed payment of non-resident allowance under Regulation 16 and of installation, travel and removal expenses under Regulations 19, 24 and 26 on the grounds that she had not been locally recruited; she appealed against the Association's refusal; and the Secretary-General rejected her appeal on 15 September 1994 in the decision that she is now impugning.

7. Since the complainant was in Switzerland at the time of recruitment she was not locally recruited for employment at the Brussels office. It is true that the Association was free to incorporate in the letters of appointment a clause saying that she was nevertheless deemed to have local status. That is

just what another organisation properly did in the case that the Tribunal ruled on in Judgment 1108 (in re Dahlqvist). For want of a clause expressly prescribing local status the presumption is that the parties did not agree that she should have such status. The conclusion is that the contracts, read together with the Staff Regulations, set out all the terms and conditions of employment, which conferred non-local status on the complainant and gave the Association no right or power to treat her as having any other. And even if there was doubt on that score it was the Association, which was the source of all the relevant documents, that had the duty to resolve it.

8. Were the terms and conditions of employment nevertheless later altered? Clause 2 of each letter of appointment confers no distinct power to determine, or to exclude or modify, the allowances to which the complainant was entitled: it provides only for the separate notification of information on such entitlements. It is clause 7 that refers to the power of modification in accordance with Regulation 37. But all that the Association did in accordance with that provision was to set salaries and allowances at Brussels at figures lower by ten per cent.

9. Regulation 12 means that the terms and conditions of the complainant's appointment must be as set out in the written contract, and oral agreements and understandings may not be introduced to derogate therefrom. Nor may the requirements of the Staff Regulations, which form part of the contract, be amended or excluded.

10. Under clause 2 - quoted in 5 above - of the letters of appointment the Association undertakes to notify to the complainant the allowances which it considers to be due to her under the Staff Regulations; it is not empowered to limit her entitlements under the Staff Regulations.

11. Moreover, as to clause 6 of the first letter of appointment, there is no proof that she ever received a copy of the memorandum of 17 December 1992 from the Senior Personnel Officer to the Finance Office, and the letter is therefore the sole text governing her conditions of service or appointment.

12. The material issue is not what the complainant believed her status to be. Whatever she may have believed is immaterial to the meaning and effect of her contract. Her contract implicitly gave her non-local status and what she is asking now is that she be granted the benefits thereof.

13. Inasmuch as the letters of appointment say nothing of "local" or "non-local" status, the Tribunal will treat the facts of the case as decisive. A contractual provision on status would be necessary only if the matter were uncertain or if the parties had agreed that she should have a status different to the status that the facts determine. Since such agreement would involve a waiver by the complainant of her rights of non-local status, it may not be presumed in the absence of clear evidence of such waiver. The complainant was recruited in Switzerland, where she was resident, to serve in Brussels, and her entitlements under the Staff Regulations and Rules must be determined accordingly. The case must therefore be sent back to the Secretary-General so that he may determine those entitlements.

14. Under Rule 16.2 a staff member in the General Service category is entitled to receive the non-resident allowance "provided he was resident in a Member country other than Switzerland at the date of his first appointment to the Secretariat". The Association has not pleaded that rule and there is no evidence before the Tribunal on the practice of the Association in applying it to duty stations outside Switzerland. The Association will determine the complainant's entitlement to the non-resident allowance in accordance with its practice in relation to duty stations outside Switzerland.

DECISION:

For the above reasons,

1. The impugned decision of 15 September 1994 is quashed.
2. The case is sent back to the Secretary-General for determination of the complainant's entitlements under the Staff Regulations and Rules.

DISSENTING OPINION BY MR. JULIO BARBERIS

I regret I cannot agree with the other members of the Tribunal. My reasons are set out below:

1. The complainant joined the staff of the European Free Trade Association (EFTA) in Brussels as a secretary at grade G.4, step IV, under a one-year contract as from 15 January 1993 which she signed on 18 December 1992. On 20 August 1993 she

signed a second one-year contract at grade G.4 step V as from 15 January 1994. At the time of signing her first contract she was living at Nyon, in Switzerland.

2. Both contracts indicated the amount of her salary and contained the following clause:

> "The salary shown above does not include any allowances to which you may be entitled under the Staff Regulations and Rules. They will be communicated to you separately and in writing."

3. The first subject of dispute between EFTA and Mrs. Deakin concerns the terms of the employment contracts they concluded. The complainant maintains that, according to the Staff Regulations, a contract must be written and bear the signatures of both parties. She submits that her contractual ties with EFTA depend solely on the conditions she signed and, subsidiarily, the provisions of the Staff Regulations.

She observes that the only text she has signed is her contract, and it makes no mention of allowances. In the absence of any provision on the matter she argues that the Staff Regulations should apply on a subsidiary basis. Since she was living in Nyon when she signed her first contract she considers herself entitled under the Regulations to non-local status. She accordingly seeks the allowances payable to non-local staff and the refund of travel and removal expenses for her installation in Brussels. Her claims arise in law from Articles 16, 19, 24 and 26 of the Staff Regulations.

4. The Association, for its part, submits that when she signed her first contract she knew perfectly well she was to have local status. It relies on a memorandum dated 17 December 1992 which the Senior Personnel Officer sent to the Finance Office stating that "Ms. Lorraine Deakin shall be granted local status in connection with her appointment". The memorandum also indicates "cc: Ms. Deakin". EFTA adds that according to established practice the memorandum constitutes the written communication to which the contracts she signed refer.

The Association cites a memorandum of 16 December 1992, which it says is in her personal file and purportedly shows that she was to be treated as a local recruit.

5. As to the memorandum of 17 December 1992 Mrs. Deakin denies receiving a copy of it but say that, even if she had, the document would not constitute the written notice on allowances provided for in her contracts; to form part of her

contract a document must, she contends, bear her signature and the memorandum has no value in law because it was signed by an official who has no competence to take such a decision. The complainant denies any knowledge of the memorandum of 16 December.

6. EFTA has no doubt that she was aware when she signed the first contract that she was to be recruited locally: the series of meetings and discussions she had had with various members of its staff imply that Mrs. Deakin knew that she would not get non-local status at the time.

7. As stated above the complainant denies having got a copy of the memorandum of 17 December 1992, and EFTA offers no proof that she did. Nor does it give evidence of its alleged practice of giving officials notice of their entitlements to allowances in internal memoranda. To allege a practice before a court of law, save one so obvious as to be generally acknowledged, requires proof.

8. However, I take the view that the ruling should depend on the evidence and material put forward by the complainant and her conduct as from December 1992 deserves special weight.

9. She sums up meetings she had with various officials starting in December 1992. It is plain from this and other documents submitted with her complaint that on 18 December 1992, when she signed her contract, she was aware that EFTA had not granted her non-local status. What is more, all her efforts to obtain non-local status after signing her contract show convincingly that she knew she had been recruited locally.

10. There is evidence in a document she produces that EFTA paid her 1,200 Swiss francs in compensation for the penalty she owed the landlord of her flat at Nyon for breaking her lease before its expiry. The Association also assisted in bringing down the cost of her removal.

EFTA's payment of compensation and helping to lower her removal costs are at odds with non-local status. In other words by accepting a payment and assistance from the Association she implicitly acknowledged having non-local status. The allowances for non-local officials in the Staff Regulations are intended to cover the very expenses for which the complainant received the aforementioned payment and assistance. Had EFTA further granted her non-local status she would have got double payment under the same heads: the amount it already paid her plus the allowances provided for in the Staff Regulations.

That is why her accepting payments from EFTA now prevent her from claiming the allowances accruing from non-local status. From a legal standpoint hers is a typical case of estoppel, a universally recognised principle: non venire contra factum proprium.

11. The second subject of the dispute concerns the legal nature of local recruitment.

According to the complainant, it is a matter of objective fact: someone recruited on the spot has local status and someone recruited from elsewhere will necessarily have non-local status. The determining factor is the official's residence at the time of recruitment.

EFTA, on the other hand, submits that the question of whether an official is to have local or non-local status is determined not by the actual situation but by the wishes of the parties. In support of this argument it points out that in international organisations it is common and consistent practice to conclude employment contracts with someone residing outside the place of the organisation's headquarters, in which it is stipulated that he has local status.

12. As for the distinction between local and non-local status, an international organisation is ordinarily free to come to an agreement with the official concerned on what status he is to have. What matters is not his residence at the time of recruitment but the terms agreed to by the parties: see Judgment 1108 (in re Dahlqvist). Insofar as EFTA applies this rule there was nothing improper in conferring local status on an employee whose residence was at Nyon.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Mark Fernando, Judge, and Mr. Julio Barberis, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

Wm Douglas

William Douglas

Mark Fernando

Julio Barberis

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FIRST SESSION

In re POPINEAU (No. 9) Judgment 1540

THE ADMINISTRATIVE TRIBUNAL,

Considering the ninth complaint filed by Mr. Gérard Popineau against the European Patent Organisation (EPO) on 28 August 1995 and corrected on 9 October, the EPO's reply of 24 November 1995, the complainant's rejoinder of 11 February 1996 and the Organisation's surrejoinder of 2 April 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to this case are summed up under A in Judgment 1363 on Mr. Popineau's sixth, seventh and eighth complaints.

On 27 October 1994 the Central Staff Committee of the European Patent Office, the EPO's secretariat, published a note criticising "the lack of safeguards in law in intergovernmental organisations", describing the Tribunal as an inadequate "court of first and last instance" and finding fault with Judgment 1363. On 26 November the EPO "Gazette" published an article signed by the President of the Office answering the criticisms and commenting on Judgment 1363. The article mentioned the Tribunal's finding that the Organisation had produced sufficient evidence in support of its accusations against the complainant by providing the business registration number of the firm known as Gérard Popineau Consultants.

On 2 December 1994 the complainant asked the President to let him answer and correct those comments on Judgment 1363. Having got no reply he appealed on 19 February 1995 against the implied rejection of his claim.

By a letter of 9 March 1995 the Director of Staff Policy informed the complainant that the President rejected his appeal and had put the matter to the Appeals Committee.

By a letter of 15 May the complainant asked the Director of Staff Policy for written confirmation of his statement that the Office would not be entering a reply to his appeal of 19 February.

By a letter of 26 May 1995 the Principal Director of Personnel told the complainant that since the Tribunal's judgments had determined his status once and for all the Office would not be replying to any more of his internal appeals. That is the decision he is impugning.

B. The complainant contends that the President's article published in the "Gazette" of 26 November 1994 gave a libellous account of the issues of fact that Judgment 1363 had ruled on. In support of his plea he produces a letter of 16 February 1995 from the French National Institute of Industrial Property. The letter says that on 9 August 1994 the Institute gave the complainant a certificate stating that at the date of search it had found no trace in the business register of the firm "Gérard Popineau Consultants". The complainant concludes that the President uttered "a lie" or else had given "counterfeit evidence" to the Tribunal.

He asks the Tribunal to send the case back to the Organisation and order it to let him publish reply and correction in the "Gazette". He seeks awards of 40,000 French francs in moral damages and 5,000 francs in costs.

C. In its reply the Organisation submits that though the complaint is tantamount to an indirect and improperly presented application for review of Judgment 1363 it is not challenging receivability.

On the merits it observes that the letter of 16 February 1995 which the complainant cites is not a new fact. He had ample opportunity to obtain and produce such a certificate during the disciplinary and appeal proceedings and the proceedings before the Tribunal. The President's article is not libellous since the passage he objects to, which is about the registration of his company, simply reproduces what the Tribunal said in Judgment 1363.

D. In his rejoinder the complainant maintains that his firm was never on the business register. The Disciplinary Committee never referred to such registration and the Organisation did not bring the matter up later.

E. The EPO repeats that the letter of 16 February 1995 is not a new fact. It observes that in Judgment 1363 the registration of the complainant's firm was not the only evidence the Tribunal relied on in reaching its decision but was of lesser importance.

CONSIDERATIONS:

1. This is Mr. Popineau's ninth complaint against the EPO. He is asking the Tribunal to order the Organisation to allow him to answer and correct an article published in the "Gazette", the EPO's internal news bulletin, on the grounds that it discredited him and thus caused him moral injury.

2. The material facts are recounted in Judgment 1363 of 13 July 1994 under 2 to 16. The complainant joined the EPO in 1983 as an examiner. On 4 May 1992 the Organisation started disciplinary proceedings against him for serious breach of his professional obligations, and dismissed him for disciplinary reasons on 1 February 1993. The Tribunal found that without leave from the Organisation he had engaged in outside activity while in its employ: he had set up and run a consultancy firm which did business in the EPO's own area of competence.

3. In answer to a note circulated on 27 October 1994 by the Central Staff Committee criticising Judgment 1363 and the Tribunal the President of the Office published in the EPO "Gazette" of 26 November 1994 an article entitled "ILOAT: No legal safeguards for public servants?". By a letter of 2 December 1994 the complainant applied to the President for the right to answer and correct the article. Having got no reply, he filed an internal appeal against the implied refusal. On 9 March 1995 the Director of Staff Policy informed him that the matter had been put to the Appeals Committee for an opinion. By a letter of 26 May 1995 the Office told him that the Tribunal's judgments on his complaints had determined once and for all his status at the EPO and that the Office would not be entering replies to any more of his internal appeals. That is the decision he is impugning.

4. The Organisation first says that it is not objecting to receivability, the complaint being in any event devoid of merit.

5. One passage in the article read:

> "According to Judgment 1363 ..., an official was dismissed with a reduction in his severance grant because his behaviour towards the Organisation was found to be an extremely serious breach of his professional obligations. While on unpaid leave the official had been gainfully employed in legal research into patents for the firm '(name of the official) Consultants' that he had founded."

The article went on to report the Tribunal's "finding that, by producing the firm's business registration number, the detailed description of the firm's activities and an advertising prospectus, the Organisation had provided sufficient evidence of guilt".

6. The complainant has the following objections to those passages.

(1) They give a libellous account of the facts as put to the Tribunal and ignore the special circumstances in which judgment was delivered.

(2) Though his name is not mentioned he may be easily identified.

(3) Either it is untrue to say that the Organisation produced a business registration number or else the evidence it submitted to the Tribunal was counterfeit.

(4) The work he did was professional, not commercial.

(5) The libellous version of the facts causes him serious moral injury by discrediting him in the eyes of former colleagues.

He says that he supported his internal appeals with evidence to rebut all the charges against him and that the Tribunal refused hearings and the calling of witnesses for the defence. In sum he claims the right to answer and correct the article by virtue of a universally acknowledged principle of law.

7. He is wrong. He need only read the text to see that the passages of the article he finds libellous merely reflect Judgment 1363, which sets out the Tribunal's findings on the evidence entered by both parties. Those findings, forming part as they do of the Tribunal's judgment, are no longer challengeable and are binding on both parties as true statements of fact.

8. The only challenge that the Tribunal will allow, by way of exception, is an application for review, and a litigant may put forward such specific pleas for review as the discovery of some new fact or a formal flaw. Such indeed are the pleas that the complainant seems to have in mind. But this complaint seeks, not review of Judgment 1363, but the right of reply to the article in the "Gazette". And there is no evidence to suggest anyway that his objections are sound.

9. Since the EPO merely referred to relevant passages of Judgment 1363, the complaint must fail, including the claims to moral damages and costs.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

(Signed)

William Douglas E. Razafindralambo Egli

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FIRST SESSION

In re POPINEAU (No. 10) Judgment 1541

THE ADMINISTRATIVE TRIBUNAL,

Considering the tenth complaint filed by Mr. Gérard Popineau against the European Patent Organisation (EPO) on 28 August 1995, the EPO's reply of 24 November 1995, the complainant's rejoinder of 11 February 1996 and the Organisation's surrejoinder of 2 April 1996;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to this dispute are set out under A in Judgments 1540 and 1542, also delivered this day, on the complainant's ninth and eleventh complaints.

By a letter of 15 May 1995 he asked the EPO's Director of Staff Policy for written confirmation of remarks he attributed to the Director, including one that he had filed "too many" internal appeals and the European Patent Office, the secretariat of the EPO, would therefore let him put "such appeals" directly to the Tribunal in future.

By a letter of 26 May the Principal Director of Personnel told him that since the Tribunal's judgments had ruled once and for all on his relations with the EPO the Office did not intend to reply to any further internal appeals from him. By a letter of 30 May he asked the Principal Director what was to become of his appeal of 15 May. Also on 30 May he lodged an appeal with the Appeals Committee claiming a reply from the Office to each of his appeals. He is impugning the implied rejection of that appeal.

B. The complainant submits that the implied refusal by the President of the Office to reply to his appeals prevents the Committee from delivering an opinion on them. Under Article 109(1) of the Service Regulations the President takes a final decision "having regard to this opinion". The impugned decision is in breach of that provision. It is also discriminatory and unfair and a violation of his rights.

He seeks the quashing of the EPO's implied decision to stop replying to his internal appeals and awards of 40,000 French francs in moral damages and 5,000 francs in costs.

C. In its reply the EPO invites the Tribunal to join this complaint with his ninth and eleventh ones on the grounds that they serve the same purpose and because the claims and appeals which preceded them prompt the decision he is now impugning.

The President, it contends, is under no duty to refer a case to the Appeals Committee if it is plain from the start that such proceedings would serve no purpose. The complainant's claims and appeals are flagrantly vindictive. By dispensing with the internal procedure the President has not denied the complainant his right of appeal since Article 109(2) of the Service Regulations says that silence implies rejection, against which appeal lies to the Tribunal, the internal proceedings being at an end.

D. In his rejoinder the complainant objects to joinder on the grounds that the claims in his ninth, tenth and eleventh complaints are not the same. It is sheer bad faith, he says, for the EPO to pretend it has forgotten about the President's referring his appeal of 19 February 1995 to the Appeals Committee. The President was under a duty to have the proceedings go ahead.

E. In its surrejoinder the EPO presses its application for joinder. What caused it to change its mind between 9 March and 26 May 1995 was the complainant's filing a whole raft of new claims.

CONSIDERATIONS:

1. Facts with a bearing on this case are set out under 2 and 3 in Judgment 1540, also delivered this day, on his ninth complaint, in which he claims the right to answer an article in the EPO's "Gazette". In his tenth complaint he seeks the quashing of an implied decision by the Office to stop answering any internal appeals he may lodge.

The application for joinder

2. In its reply the defendant applies for joinder of this complaint with Mr. Popineau's ninth and eleventh cases.

3. According to precedent complaints are to be joined only if they raise the same issues of fact and of law. The ninth and tenth complaints do rest on the same facts - the publication of the article in the "Gazette" - and impugn the same decision, albeit each challenges a different part of it. But the issues of law are different. The ninth complaint is about the right of reply to the article whereas the tenth pleads breach of the rules on internal appeal. The eleventh is distinct both in fact and in law from the other two: it is about staff union rights. So the conditions for joinder are not met.

The merits

4. The complainant offers three pleas in support of his claim to the quashing of the EPO's decision to stop answering his internal appeals:

(1) The decision holds up the internal procedure, keeps the Committee from delivering an opinion and offends against Article 109(1) of the Service Regulations.

(2) It is discriminatory and offends against the principles of equality and equity embodied in the Universal Declaration of Human Rights.

(3) It is a violation of his rights.

5. The EPO's answer is that it is under no duty to refer a case to the Appeals Committee if from the outset appeal appears pointless; under Article VII(1) of the Tribunal's Statute a complaint is in any event receivable if the internal remedies are exhausted; and under Article 109(2) of the Service Regulations silence implies rejection and closes the internal proceedings.

6. The Organisation's argument succeeds. Refusal to answer an appeal is not obstruction: the litigant may still appeal to the Tribunal against the implied rejection. Besides, the EPO's attitude would be discriminatory and run counter to the principles of equality and equity only if it failed to adopt the above attitude towards someone else who had lodged many internal appeals on the strength of much the same set of facts, including one in disregard of res judicata. Since no one has, the complainant's plea is mere academic supposition. Moreover, the President of the Office pleads the need to keep down the amount of internal litigation so as not to overload the Administration with pointless work and expenditure. He has thereby assessed the Organisation's interests and made an exercise of discretion with which the Tribunal may not interfere in the circumstances of this case. The complainant's claims fail in their entirety.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

(Signed)

William Douglas E. Razafindralambo Egli

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FIRST SESSION

In re POPINEAU (No. 11) Judgment 1542

THE ADMINISTRATIVE TRIBUNAL,

Considering the eleventh complaint filed by Mr. Gerard Popineau against the European Patent Organisation (EPO) on 28 August 1995, the EPO's reply of 24 November 1995, the complainant's rejoinder of 11 February 1996 and the Organisation's surrejoinder of 2 April 1996;

Considering Article II, paragraphs 5 and 6(a) of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts that have a bearing on this case appear under A in Judgment 1244 on the complainant's fifth complaint.

As that judgment says, the complainant was in the employ of the European Patent Office, the secretariat of the EPO, when he set up a staff union known as the European Search Federation (FER). On 17 February 1995 he asked the President of the Office what facilities the EPO would, in keeping with its rules, afford the new union and its representatives for staff union work; where the rules were silent, he wanted to see suitable measures taken.

By a letter of 13 March 1995 the Director of Staff Policy informed the complainant of the President's view that the complainant had already raised in his fifth complaint the question of letting the FER function on EPO premises and the Tribunal had ruled that out in Judgment 1244. By a letter of 16 March the complainant pointed out to the Director that Judgment 1244 had nothing to do with the arrangements for letting the FER carry on staff union business.

In a letter of 15 May the complainant asked the Director for written confirmation of the statement attributed to him that the President would not answer the complainant's request for a decision on facilities for the FER.

By a letter of 26 May 1995 the Principal Director of Personnel told the complainant that since the Tribunal's judgments had determined his status once and for all the Office would be answering no further internal appeal he lodged. In a letter dated 30 May the complainant asked the Principal Director what was to be done about his appeal of 15 May. By a letter of 7 June 1995 he appealed to the Appeals Committee pressing his claim to facilities for the FER and its representatives. He is impugning the implied rejection of that appeal.

B. The complainant says that as a former EPO official and a member of the FER he has a legitimate interest in knowing what the rules are and what has been done to enable the FER's representatives to carry on staff union work. Citing Judgment 1244, he submits that to recognise a union and then deny it facilities is inconsistent. It is also discriminatory since other unions get facilities.

He wants the Tribunal to send the case back so that the Organisation may provide a meeting room and notice board for the FER and allow its representatives time off. He claims one French franc in token moral damages and 5,000 francs in costs.

C. In its reply the EPO contends that the complaint is irreceivable because the Tribunal lacks competence ratione materiae. The complainant may not rely on Article 30 of the Service Regulations on freedom of association: the article does not expressly apply to former officials. Besides, even supposing that the FER did exist and the complainant belonged to it he would not be entitled to claim facilities on that account alone.

D. In his rejoinder the complainant maintains that the EPO has recognised the FER, it is a union that may represent him, and it should have facilities: that is his cause of action.

E. The EPO observes in its surrejoinder that the complainant does not say whether the FER exists.

CONSIDERATIONS:

1. This dispute is about the EPO's refusal of the complainant's request for the grant of facilities to the European Search Federation (FER) of the EPO. The complainant founded that union on 4 July 1990, while he was still in the EPO's employ. Earlier he had set up an EPO branch of the French National Union of Research Scientists, an affiliate of the National Education Federation (SNCS-FEN). His fifth complaint challenged the Organisation's refusal to let the SNCS-FEN have staff union facilities. Judgment 1244 dismissed it, but noted that on 17 February 1992 the President of the Office had lifted a ban he had laid on the FER.

2. By a letter of 17 February 1995 the complainant, as a member of the FER and a former employee of the EPO, asked the Organisation to tell him what steps the rules prescribed to let the FER's representatives carry on staff union business and, if need be, to make good omissions in those rules. The Director of Staff Policy pointed out in a reply of 13 March 1995 that the complainant had raised the matter in his submissions on the complaint dismissed in Judgment 1244. Taking the view that that judgment dealt only with the SNCS-FEN, the complainant put claims to which he demanded a reply. The EPO did reply, in a letter of 26 May 1995: it would not be answering his claims or internal appeals. On 7 June 1995 he lodged an internal appeal against the decision of 13 March 1995 not to reconsider the matter of the FER. It is the implied rejection of that appeal that he is impugning in this complaint.

3. The EPO pleads that his complaint is irreceivable on three counts:

(1) the Tribunal lacks competence ratione materiae;

(2) the complaint has no substance;

(3) he has no locus standi and no cause of action.

4. The gist of pleas (1) and (3) is that, not being an official, the complainant may not rely on Article 30 of the Service Regulations on freedom of association; he purports to be acting, not for himself, but on behalf of the local section of the FER; and on dismissal he lost all ties with the EPO and so has no cause of action.

5. The reference to the complainant's dismissal suggests a plea of lack of competence ratione personae rather than materiae. As the EPO can scarcely deny, this complaint, which seeks the grant of staff union facilities to the FER, does concern the exercise of the freedom of association that

Article 30 of the Service Regulations guarantees. So the Tribunal is competent ratione materiae under Article II(5) and (6)(a) of its Statute, whereby it is open to any official - even one whose employment has ceased - who alleges breach in substance or in form of the staff regulations.

6. But may the complainant file suit about the exercise of freedom of association by representatives of the FER? To that question the answer is no. As was held in Judgment 1392 (in re Raths No. 2) - to cite but one - Article 106 of the EPO's Service Regulations declares the system to be one of individual appeal. That, too, is the essence of a complaint under Article II(5) of the Statute. So a complaint is receivable only if it is about an individual official's status as an employee of the organisation, not about the collective interests of trade unionists. Insofar as the complaint purports to be made on behalf of the FER it is irreceivable.

7. Moreover, as the EPO contends, the complainant has no locus standi to make a claim against his former employer. After dismissal he no longer had any connection with the EPO in law. Nor, since he was in the EPO's employ for under ten years, is he entitled under Article 7 of the Pension Scheme Regulations to draw a pension: he can therefore derive no cause of action from the breach of any provision of the EPO's rules and regulations. On that score too his complaint is irreceivable.

8. For the foregoing reasons the complaint must fail, there being no need to entertain the plea that it has no substance, an issue that goes rather to the merits than to procedure.

9. Since his complaint must be dismissed so too are his claims to moral damages and to costs.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

(Signed)

William Douglas E. Razafindralambo Egli

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FIRST SESSION

In re POPINEAU (No. 12) Judgment 1543

THE ADMINISTRATIVE TRIBUNAL,

Considering the twelfth complaint filed by Mr. Gérard Popineau against the European Patent Organisation (EPO) on 21 October 1995;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 7 of its Rules;

Having examined the written submissions;

CONSIDERATIONS:

1. The complainant, a former employee of the EPO, has for years been in litigation with the Organisation over his administrative status and the outcome of complaints to the Tribunal. In this complaint he seeks the waiver of the diplomatic immunity of the President of the European Patent Office so that "the ordinary course of justice will not be baulked".

2. Article 13(1) of the Protocol on Privileges and Immunities of the European Patent Organisation reads:

> "... the President of the European Patent Office shall enjoy the privileges and immunities accorded to diplomatic agents under the Vienna Convention on Diplomatic Relations of 18 April 1961."

The immunities include immunity from jurisdiction. Article 19(2) of the Protocol further provides:

> "The President of the European Patent Office has the duty to waive immunity where he considers that such immunity prevents the normal course of justice and that it is possible to dispense with such immunity without prejudicing the interests of the Organisation. The Administrative Council may waive immunity of the President for the same reasons."

3. The complainant wrote asking the Administrative Council to apply the last sentence of Article 19(2). His request was not granted.

4. The Administrative Council exercised its discretion under Article 19(2) in declining to waive the President's immunity from jurisdiction. Such exercise of discretion is a matter outside the Tribunal's competence, affecting as it does relations between the defendant Organisation and a member State. The complaint is therefore "clearly irreceivable" and must be summarily dismissed in accordance with Article 7 of the Tribunal's Rules.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

(Signed)

William Douglas E. Razafindralambo Egli

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

EIGHTY-FIRST SESSION

In re GERY-POCHON Judgment 1544

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Line Rose Marie Gery-Pochon against the United Nations Industrial Development Organization (UNIDO) on 18 July 1995, UNIDO's reply of 23 October, the complainant's rejoinder of 20 November 1995 and the Organization's surrejoinder of 19 February 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows;

A. The complainant, a French citizen who was born in 1953, joined UNIDO on 13 February 1983. It assigned her as an expert to the Investment Promotion Service at its office in Paris. It gave her a fixed-term appointment, which it extended until 1988. On 1 September 1991 it granted her a new fixed-term appointment for one year as its country director at Harare, in Zimbabwe. On 31 August 1992 its Personnel Administration Section offered her an extension of appointment until 31 December 1993.

By a fax of 13 July 1993 the Director of the Personnel Services Division told her that by way of a reduction in staff the Director-General had decided to end her appointment prematurely. By a fax of 27 July she asked the Director to explain where she stood. The Director sent her an undated fax saying that she was to stop work at 13 August; that since her letter of appointment stated that her service with UNIDO was limited to the post of country director at Harare she could have no reassignment within UNIDO; and that her appointment would end at 15 October. In answer to a request she made on 3 August the Director informed her in a fax of 10 August that the Director-General would hold the date of her departure over to 31 October and terminate her contract on grounds of a reduction of staff in accordance with Staff Regulation 10.3(c).

By a memorandum of 6 September 1993 she informed the Director-General of her intention to appeal against the decision to dismiss her as from 31 October. By a letter of 3 November, which went to her by fax on the 9th, the Director-General upheld his decision.

By a memorandum of 27 December 1993 she appealed to the Joint Appeals Board. In its report of 22 May 1995 the Board concluded that UNIDO dismissed her for a reason other than the one given by the Administration, and deprived her of her right to a hearing. It therefore recommended that the Director-General withdraw the decision to dismiss her, reinstate her in the rights that were hers under her appointment that expired on 31 December 1993 and take a new decision on the renewal of her appointment, to be applied retroactively.

By a fax of 21 June 1995 the Secretary of the Appeals Board conveyed to her a decision taken by the Director-General on 19 June postponing her termination but "confirming" that her appointment would not be renewed. That is the decision she impugns.

By a letter of 6 July she asked the Director-General to reconsider his decision, but he upheld it in a letter of 2 August.

B. The complainant points out that the Joint Appeals Board upheld her appeal on the grounds of misuse of authority and denial of her right to a hearing. She submits that by rescinding the decision to terminate her appointment, the Director-General acknowledged that it was unlawful.

She challenges the lawfulness of the decision of 19 June 1995 which refused renewal of her appointment beyond 31 December 1993, and which purportedly confirmed an earlier one. First, she alleges that until 19 June 1995 the Director-General took no express decision to terminate her appointment. No such decision was ever brought to her notice or mentioned by the Administration in the internal appeal proceedings. The purported confirmation of an earlier decision that was never taken is mere "sleight of hand" calculated to mask an attempt to take a retroactive decision. A decision to terminate an appointment must be properly notified to the staff member before it can take effect.

Since the decision to terminate her appointment, which was unlawful, has been rescinded, by implication her appointment has been renewed.

Lastly, there was no report on her performance before the decision of 19 June 1995 was taken, and it was not substantiated anyway.

She seeks (1) the quashing of the decision of 19 June 1995 purporting to confirm the non-renewal of her appointment beyond 31 December 1993; (2) payment of her salary, the post adjustment allowance at the rate applying in France, and other allowances from 1 November 1993 to the date of the judgment, plus interest; (3) reinstatement under a two-year appointment or, failing that, three years' pay made up as set out in (2) above; (4) moral damages; (5) 120,000 French francs, in material damages; and (6) 25,000 francs in costs.

C. In its reply UNIDO asserts that it paid the complainant all her entitlements up to the expiry of her appointment on 31 December 1993 and that she accepted the payment.

It submits that she had no reason to expect renewal: the letter of appointment sent to her on 31 August 1992 said that it carried no expectancy of renewal and was confined to her post in Zimbabwe.

In his letter of 19 June 1995 the Director-General informed her that the postponement of dismissal made no difference to the decision on non-renewal. Though separate, the two decisions were complementary. It would be contrary to give notice of termination only to contemplate renewal of contract a few months later.

The Tribunal held in Judgment 1317 (in re Amira) that it might in exceptional cases order reinstatement of someone who had held a fixed-term appointment; but there are no exceptional circumstances here.

D. In her rejoinder the complainant maintains that until 19 June 1995 UNIDO took no express decision not to renew her contract. It would have been absurd for the Director-General to decide when her appointment had already been terminated. Accepting her entitlements under the contract which expired on 31 December 1993 did not mean acquiescence in the decision of 19 June 1995.

E. In its surrejoinder UNIDO repeats that the complainant had no legitimate expectancy of a renewal. Her supervisors had warned her early in 1993 that her appointment would not be extended.

CONSIDERATIONS:

1. The complainant served on the staff of UNIDO from 1983 to 1988. She rejoined UNIDO as its country director in Zimbabwe on 1 September 1991. She was granted a fixed-term appointment for one year and had it extended to 31 December 1993. The nub of her complaint is that it was not renewed thereafter.

2. Her letter of appointment stipulated that what she had was a "project personnel appointment"; that it could be terminated before the date of expiry under the Staff Rules and Regulations by giving one month's notice in writing; that it was "limited to service as UNIDO Country Director in Zimbabwe"; and that it carried "no expectancy of renewal or of conversion to any other type of appointment". UNIDO Staff Rules 203.02 and 210.02 applicable to project personnel also provide that a fixed-term appointment carries no expectancy of renewal and ends, without notice, at the date of expiry stated in the contract.

3. The complainant's supervisor was the Resident Representative of the United Nations Development Programme (UNDP) in Zimbabwe. Her work was undoubtedly satisfactory. On 19 May 1992 the Representative appraised her performance as excellent and recommended extending her appointment. Later, when the UNDP asked UNIDO to suggest from among women on its staff candidates for posts as resident representative and co-ordinator the Personnel Administration Section put her name forward. And again, late in July 1993, the Director of the Personnel Services Division confirmed that there was no adverse report on her performance.

4. In October 1992 the UNDP appointed a new Resident Representative in Zimbabwe. The complainant did not get on well with him, and on 29 April 1993 asked the Director-General to consider assigning her elsewhere because of what she called an "unhealthy climate of work".

5. On 21 June 1993 the Director-General issued a bulletin announcing reduction of staff. One of the guidelines of the exercise - said the bulletin - was that only if voluntary measures proved insufficient would he eventually be resorting to termination, and staff might apply by 21 July 1993 for "agreed termination". Even before that date, however, the Director-General decided to withdraw the complainant from Zimbabwe, and she was so informed by a fax from the Director of the Personnel Services Division dated 13 July 1993, which gave her one month to finish her work in that country. Having protested that that was not long enough, she was given until

15 October. By a fax of 10 August 1993 the Director told her that her appointment would end at 31 October 1993.

6. In a memorandum of 27 December 1993 the complainant appealed against that decision to the Joint Appeals Board claiming reinstatement and compensation. She contended that termination was for reasons other than staff reduction and that the premature termination deprived her of a reasoned decision on the matter of renewal of her appointment. She claimed compensation for the damage to her career prospects as well as for the losses which she had incurred because her precipitate recall from Zimbabwe had required the urgent sale of a motor car and household effects.

7. In her appeal the complainant cited a memorandum which the Director of the Area Programmes Division wrote on 24 May 1993 to the Director of the Personnel Services Division. The Director of Area Programmes asked headquarters to recall her from Zimbabwe by 4 July 1993 and suggested repatriating her and putting her on leave until the end of her contract. She pointed out that in a letter dated 18 June 1993 to the Director-General she had said that on 24 May the Director of Area Programmes had telephoned her in Zimbabwe to give her a confidential warning of official notice from headquarters that her contract would not be renewed after December 1993 and to tell her that because of conflict with the Representative she was to leave by 1 July 1993. Her letter went on to say that she had asked the Director "whether the Director-General was fully informed and concurred with these decisions", but that she had got no straight answer, and that she had not received the official notice he had warned her of. The Director-General - said the complainant - did not reply. Instead there came her recall and the termination of her appointment.

8. In reply to her appeal UNIDO told the Joint Appeals Board that the Director of the Area Programmes Division "was not authorised to act or make statements on behalf of the Director-General on personnel matters, [and] therefore anything he allegedly said in this regard carries no weight".

9. In its report of 22 May 1995 the Board concluded that the termination was not in conformity with the criteria and guidelines for staff reduction but had been ordered for other reasons; by failing to tell her of those other reasons UNIDO had denied her right of defence and committed misuse of authority. The Board recommended reinstating her up to the date of expiry of her appointment with the "right to obtain from the Organization a substantiated decision on the renewal or non-renewal of her appointment beyond 31 December 1993,

which she may then challenge, if she so wishes". But the Board added that it had

> "no authority to challenge the discretion of the Director-General regarding the outcome of a decision on renewal/non-renewal, and cannot therefore, at this stage, make assumptions to determine whether [she] deserves additional compensation based on her claim to have had a justified expectancy of renewal."

The Board concluded that the termination and her recall before the expiry of her contract together constituted "a decision with negative effect on the staff member, involving loss of professional credibility", but she had suffered no loss of career prospects, only of earnings and pension rights up to 31 December 1993.

10. By a letter of 19 June 1995 the Director-General informed her that he was reversing the decision to terminate her appointment and she would receive all payments due up to 31 December 1993, but he was confirming his decision to grant no further extension. That is the decision she is impugning.

11. A firm line of precedent has it that though a fixed-term appointment ends automatically at the scheduled date of expiry the staff member must be told the true grounds for non-renewal and given reasonable notice of it even if the contract does not expressly so require.

12. Though the Director of the Area Programmes Division did make her aware, in his telephone conversation with her on 24 May 1993, that non-renewal was being considered, no definite decision was communicated to her then or later. In any event UNIDO has denied his authority to take or even communicate any such decision.

13. UNIDO contends that the Director-General's decision, taken in July 1993, to terminate the complainant's appointment at 15 October 1993 implied a complementary one not to renew it after 31 December 1993: he would not have given notice of termination in October and still contemplated renewal beyond the end of the year. But even if the Tribunal were to accept that contention any such implied decision was flawed because she was not told the true reasons for non-renewal. In fact, as the Appeals Board held, "by terminating the appointment prior to its expiry, the Administration avoided the necessity of having to decide on the renewal or non-renewal of the [complainant's] expiring appointment". UNIDO failed to take any decision on non-renewal. That being so, it cannot succeed either in its further plea that the impugned decision of 19 June 1995 must stand because it confirmed an earlier decision:

there was no valid earlier decision. The conclusion is that UNIDO did not at any time make and communicate a valid decision not to renew the complainant's appointment. The impugned decision must therefore be quashed.

14. Reinstatement would not be appropriate in the circumstances of the case. The complainant's appointment was limited to service in Zimbabwe. From the beginning of 1993 she knew that relations with her first-level supervisor were so unsatisfactory that she could not continue to serve in that country; indeed she herself had made several requests for transfer. She could have had no expectancy of renewal of her appointment in Zimbabwe. She is, however, entitled to damages for the material and moral injury she suffered on account of the premature termination of her appointment and the failure to give her due notice of non-renewal. The Tribunal sets the amount at 25,000 dollars. She is also entitled to a sum in costs.

DECISION:

For the above reasons,

1. The Director-General's decision of 19 June 1995 is quashed insofar as it refused to renew the complainant's appointment.
2. UNIDO shall pay the complainant 25,000 United States dollars in material and moral damages.
3. It shall pay her 3,000 dollars in costs.
4. Her other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

Wm Douglas
William Douglas

Mella Carroll
Mella Carroll

Mark Fernando

A.B. Gardner
A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FIRST SESSION

In re PARY (No. 5)
(Application for review)

Judgment 1545

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for review of Judgment 1437 filed by Mr. Lazaro Pary on 29 January 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 7 of its Rules;

Having examined the written submissions;

CONSIDERATIONS:

1. In Judgment 1437 of 6 July 1995 the Tribunal dismissed the third complaint by Mr. Pary against the World Intellectual Property Organization (WIPO). His chief claim therein was to the quashing of a decision the Director General had taken on 23 September 1993 to put him on a post for a messenger and driver but which was revised on 29 April 1994 to confine his duties to mere messenger. He had also sought transfer to a post on a par with one he had had earlier, damages for loss of earnings and awards of 60,000 Swiss francs in moral damages and 10,000 francs in costs.

2. As the Tribunal has often held, its judgments carry the force of *res judicata* and are not subject to appeal. Only in exceptional cases may it review them. Application for review is an extraordinary remedy that is not to be mistaken for appeal. Appeal lies only to a court of higher instance that may reconsider the whole case, whereas review, as contemplated in the case law, falls to the Tribunal itself. The rules it applies to review are stated in, for example, Judgment 442 (in re Villegas No. 4), which limits the admissible grounds for review to the neglect of some material fact, to the discovery of a "new" one, to a material error and to failure to rule on a claim.

3. None of the complainant's pleas is admissible. All he pleads is misappraisal of the facts and of the evidence, misinterpretation or misapplication of the law, and failure to answer some of his arguments.

4. Stated in more particular terms, one of his contentions is that the Tribunal overlooked a mistake the Director General had committed in making him messenger and driver when he did not have the right sort of driving licence. The plea is worthless: Judgment 1437 addressed the matter under 4:

> "... the Director General removed that formal flaw by deciding on 29 April 1994 to follow the Board's recommendation and by amending his job description. The mistake has caused him no injury because he has done only messenger work since transfer".

5. Another of his pleas rests on new facts that he places in November and December 1995. Though the discovery of a new fact may afford grounds for review, the fact must date from before the material judgment and be such as would have affected the ruling had the Tribunal known of it in time. The facts the complainant alleges are subsequent to 6 July 1995, the date of Judgment 1437. They may afford grounds for a new complaint but not for review of that judgment.

6. For the foregoing reasons the application is clearly irreceivable under Article 7 of the Tribunal's Rules.

DECISION:

For the above reasons,

The application is dismissed.

In witness of this judgment Mr. Michel Gentot, Vice-President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

(Signed)

Michel Gentot Julio Barberis Egli

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FIRST SESSION

In re RANDRIAMANANTENASOA

Judgment 1546

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Charles Randriamanantenasoa against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 11 September 1995 and corrected on 11 October, UNESCO's reply of 21 November, the complainant's rejoinder of 26 December 1995 and the Organization's surrejoinder of 8 February 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a citizen of Madagascar who was born in 1941, joined UNESCO in 1980 at grade P.1. At the material time he was employed in the Division of Youth and Sports Activities of the Organization's Sector of Social and Human Sciences. He held a fixed-term appointment at grade P.4.

His supervisors had always found his work satisfactory until his last performance report, for the period from 1 October 1991 to 30 April 1993, in which they gave him an "E" rating ("unsatisfactory"). He was admitted to hospital on 2 February 1993 and on 5 March underwent a quadruple heart bypass operation. He was on sick leave until 20 June and learned of his performance rating on going back to work. He signed the report on 13 August saying that he intended to challenge it, contrary to what he had said in a "self assessment" written on 9 July.

He took annual leave from 13 July to 1 October 1993. On his return he learned that his post was to be abolished at the end of the year. On 21 October the Bureau of Personnel told him that he was soon to appear before the Senior Personnel

Advisory Board (SPAB) to consider the proposal by the Assistant Director-General in charge of the Sector that his contract should not be renewed. But the Bureau postponed the meeting on the grounds that the Reports Board had not yet seen his objections to the report. The Reports Board met on 7 December 1993 and its recommendation, which the Director-General approved on 6 January 1994, was to confirm the E rating. By a memorandum of 4 February 1994 the complainant made a protest against that decision to the Director-General and on 30 March filed notice of appeal to the secretary of the Appeals Board.

On 1 January 1994 the complainant had been put on a temporary post, his former one having been abolished. The SPAB met on 5 April 1994. It recommended assigning him to a suitable post and writing a new report to cover the normal two-year period. But by a memorandum of 31 May the Director of the Bureau of Personnel informed him that the Director-General had decided on grounds of unsatisfactory service not to renew his appointment after 30 June. By a memorandum of 30 June he protested to the Director-General and on 1 August 1994 filed a second notice of appeal with the secretary of the Appeals Board. By a memorandum of 4 August 1994 the Director of the Bureau of Personnel told the complainant that the Director-General was upholding the decision not to renew his contract beyond 30 June.

On 30 September 1994 he filed a single brief with the Appeals Board appealing against both the decision of 6 January 1994 confirming his performance rating and the decision of 31 May 1994 not to renew his appointment. The Appeals Board met on 28 June 1995. It advised the Director-General to disregard his last performance report and reinstate him in a suitable post. By a letter of 13 July he asked the Director-General to reinstate him in accordance with the Appeals Board's recommendation. On 11 September 1995 he filed this complaint with the Tribunal.

B. The complainant accuses UNESCO of abuse and misuse of authority, and in support he cites four "measures" taken by his first-level supervisor: the E rating, which may warrant dismissal; the abolition of the programme he was in charge of, in an attempt to show that his post was redundant; the abolition of his post as a pretext for creating another almost identical one; and the charge of serious misconduct in an arbitration case in which UNESCO had to pay 236,000 French francs to an outside consultant. The measures were, he believes, all part of "a plot by the reporting officer to get rid of him" because of a conflict of interest between them.

The decision not to renew his appointment shows an error of law in that it is not properly substantiated.

The Bureau of Personnel and the Director-General drew mistaken conclusions from the evidence: the Bureau of Personnel wilfully overlooked the error of judgment by the reporting officer, who later acknowledged in public that the complainant's health might well have adversely affected his work; and the Director-General ignored the comments on his health.

Lastly, he alleges breaches of due process. First, contrary to the instructions in administrative circular 1743, the reporting officer failed to discuss the performance report with him and gave him no warning before writing the final text. Secondly, the decision not to renew his appointment followed neither a written warning nor a relegation in step, which point 7 of the circular lists as one of the possible consequences of an E rating. So he lost the "right to a another chance".

He asks the Tribunal to quash the decision not to renew his appointment and order UNESCO to reinstate him as from 1 July 1994 in a post that matches his qualifications and experience, award damages for the material and moral injury to himself and to his family, and at least 210,000 French francs in damages for loss of earnings due to the non-renewal. He seeks costs.

C. UNESCO replies that in refusing to renew the complainant's appointment the Director-General exercised his discretion in the Organization's interest. He took that decision on the grounds that the complainant's service was unsatisfactory, an assessment fully substantiated in the last performance report. Besides, the complainant did not challenge the substance of the report. The duties of the new post are different from those of the complainant's former one.

The reporting officer never said that his health might explain or excuse his poor performance. His own doctor did not take him off work. He himself admits that "not until January 1993 was his work affected by serious nervous and heart disorders". UNESCO concludes that the many shortcomings in his performance before January 1993 had nothing to do with his ailments.

There was no breach of due process. The reporting officer had often drawn the complainant's attention orally and in writing to his professional shortcomings, and he himself admitted in the self-assessment that he had discussed his ratings before the final report was drawn up; so he may not say that they took him aback. As for the written warning that usually precedes non-renewal, the case law shows that such a warning is not always necessary.

D. In his rejoinder the complainant submits that the real reason for the non-renewal of his appointment is unclear. He challenges the adverse appraisal of his performance in the last report. His health did affect his work: his doctor wanted to put him on sick leave but he refused out of a sense of professional duty.

He repeats that the reporting procedure was flawed. He may not have challenged the ratings in the self-assessment, but he did ask to have the proposed sanctions lifted and the conclusions of the appraisal reviewed. Since the conclusions were not changed he challenged the appraisal on 13 August 1993 in accordance with the procedure set out in the form. He got no written warning.

The appraisal of his performance from March 1992 to April 1993 is tainted with prejudice and therefore should not count.

E. In its surrejoinder UNESCO maintains that the complainant's unsatisfactory performance is the sole reason for the non-renewal. The Reports Board found the reporting procedure proper. The reporting officer did give the complainant several opportunities to do better.

CONSIDERATIONS:

1. It is not clear from the complainant's muddled brief whether he is impugning one or more decisions. The Director-General took a decision on the appraisal of his performance and a distinct one not to renew his appointment on the grounds of unsatisfactory performance. The Appeals Board joined his two appeals against those decisions and made a single report. He challenges the Director-General's implied rejection of his appeals. His claims before the Tribunal appear to relate only to the decision not to renew his appointment; yet in his brief he alleges mistakes of fact and of law in the appraisal. The Organization's reply takes up all the complainant's pleas and asks the Tribunal to uphold both decisions. Lastly, the complainant submits in his rejoinder that "the performance appraisal ... must be rejected".

To treat the appraisal as final on the grounds that it had never been challenged would be to take from the complaint much of its substance. The complainant could no longer challenge the charge of unsatisfactory performance that affords the grounds for non-renewal. That is certainly not what he intends.

To assume that he is not impugning both decisions would be pedantic.

2. The gist of the complaint, then, is a challenge to two separate decisions by the Director-General: one about the appraisal and the other the non-renewal. Since the issues are linked the Tribunal will make but one ruling but it will take up each issue separately on the merits.

3. Some of what purport to be the complainant's "claims" are in law just pleas and the Tribunal need not entertain them as such. They are in any case irreceivable since he may in any event claim the quashing of the decisions or any other redress.

Likewise, what purport to be the Organization's "claims" are in law merely pleas for dismissal, and again the Tribunal need not entertain them as such. In any event counter-claims are irreceivable.

4. Some of the complainant's pleas seemingly relate to both decisions, some to only one of them.

In his submission the purpose of both decisions is to get rid of him and they show abuse of authority, calculated first and foremost to serve the interests of his first-level supervisor. The procedure of appraisal was flawed, he believes, because he was not given his say on the draft report before it became final. There were abuse of authority and mistakes of fact and of law in that he did not deserve the rating he got, and in particular he was wrongly accused of serious misconduct in an arbitration, known as the Commaille case, in which UNESCO had been ordered to pay 236,000 French francs to an outside consultant. The decision not to renew his appointment shows abuse of authority: though it was taken on grounds of unsatisfactory service, he was not given the proper written warning that precedent required. He had spent years in the Organization's service and earlier reports had been good; so it was wrongful to heed only an appraisal that covered a short period, especially when he was ill at the time and the ratings were unreliable.

5. Consistent precedent has it that a decision on an official's performance and a decision not to renew a fixed-term appointment are discretionary. They may be set aside only if they were taken without authority or in breach of a rule of form or of procedure, or if there was a mistake of fact or of law, or if some essential fact was overlooked, or if clearly mistaken conclusions were drawn from the facts, or if there was abuse of authority. See, for example, Judgment 1492 (in re Perkins) under 4 and the case law cited therein.

The Tribunal will entertain the complainant's pleas in the light of those criteria.

Pleas that challenge both decisions

6. The complainant pleads misuse of authority in both decisions. In his submission his first-level supervisor, with approval by senior officers, made improper use of appraisal and non-renewal to serve purposes alien to the Organization's interests, namely to get rid of a troublesome or even dangerous contender for being put in charge of important work for an intergovernmental committee. His ratings, he says, are proof of that. The Organization denies it.

The evidence does not suggest that the complainant's case is true or even plausible. There is no specific proof of any hostility or spirit of rivalry in his first-level supervisor. The confirmation by every single supervisor of the appraisal of his performance and the endorsement of the proposal to end his appointment tend to refute his charges of such hostility. The Director-General took the view, in proper exercise of his discretion, that the complainant's services were quite unsatisfactory, that he was unlikely to do any better and that the Organization's interests demanded termination. The decisions that ensued were the next logical step in the procedure. After all, everyone concerned knew that the appraisal of his performance might influence the decision on renewal; so it was only reasonable that the decision should follow the appraisal.

7. The complainant pleads that the Organization abolished his old post - No. SHS-259 - to make out that his duties were pointless, and created another one - No. SHS-292 - with much the same duties, which it gave to someone else.

But the Organization provides cogent evidence to show that that post was created in the context of restructuring and carried quite other duties. His plea lends no weight to the charge of hostility.

8. The complainant pleads breach of due process in that before the Reports Board had seen his objections to the appraisal his case went to a Senior Personnel Advisory Board (SPAB) that was considering his separation from the Organization.

The Organization admits as much, blames administrative oversight and says that because it had acted prematurely it withdrew his case from the SPAB.

There is no reason to doubt what the Organization says. Being put right in time, its mistake caused the complainant no injury.

9. The gist of his case is that the use of the comprehensive term "unsatisfactory service" did not warrant the consequences he suffered.

He is plainly wrong on that score. The decision on appraisal stated quite clearly what had been expected of him and how he had fallen short. Since the decision not to renew his appointment was taken on the same grounds, there is no merit in his plea that the decision rested on too general assessment.

Pleas that challenge the reporting procedure and the final appraisal

10. The complainant pleads breach of due process in that, in disregard of circular 1743 of 5 November 1990, the reporting officer failed to discuss his performance with him before writing the final text of his report.

On 3 February 1993 the Bureau of Personnel asked his supervisors for a report on his performance so that it could come to a decision about the renewal of his appointment, which was to expire at 30 September 1993. His first-level supervisor drafted the report while the complainant was on sick leave and the draft is dated 19 April 1993. The complainant was sent the report on 9 July 1993, on return from sick leave, and commented: "With hindsight I can see why AG's assessment of me was so unfavourable, and so I will not contest it ...". He asked to have "the proposed sanctions against me lifted and the conclusions of the report reviewed". He went on to acknowledge: "I was given the opportunity to discuss the above appraisal with my supervisor before he signed this report". His first-level supervisor therefore saw no reason to make any changes, signed the report and sent it to his own supervisor.

So the complainant did have the opportunity of discussing the text with the reporting officer and the procedure was not flawed. Indeed it seems only reasonable in view of his long absence that his first-level supervisor should have had the draft report ready to show him as soon as he came back to work.

11. The complainant observes that according to circular 1743 UNESCO should have sent him a written warning before giving him a poor report, but it did not.

He makes the same plea in challenging the decision not to renew his appointment. It is taken up below under 18.

Whatever effects the absence of a written warning may have on extension of appointment, the Organization is entitled in accordance with Staff Rule 104.11 bis (a) to assess an employee's performance.

12. The complainant submits that his supervisors failed to realise that poor health may have impaired his performance; the reporting officer did not acknowledge as much until the matter had gone to the SPAB.

By any objective criterion the reason why performance is unsatisfactory is irrelevant; yet poor health may explain and excuse shortcomings and leave hope of better performance of like duties in future. The complainant's supervisors knew that he was ill and there is no evidence to suggest that the reporting officers were unaware of that. In his memorandum of 25 October 1993 to the Reports Board the complainant himself spoke of his poor health, but only by way of answer to one criticism of his performance, the bad drafting of a report. That is also how the Director-General came to be informed of the state of his health. But how far did it affect his work? He himself says in his complaint tha. "until 31 December 1992 the quality of his work continued to be excellent". If so, then on his own admission his health is the less likely to have had any adverse effect.

There is therefore no reason to conclude that the Director-General ignored the fact of his illness or that his decision was flawed by a mistake of fact or of law on that account.

13. In assessing the complainant's reliability the performance report cited the Commaille case. On that case there was an award by an arbitrator which became known in the course of the reporting period. The arbitrator ordered UNESCO to pay fees to an outside consultant. The arbitrator rejected the Organization's contention that no contract had been concluded with the consultant and founded the existence of the contract on a letter that the complainant had written to the consultant, though the Organization said that his supervisors had not given him leave to do so. The Organization had also taken an ambiguous stance, said the arbitrator, by failing to answer letters from the consultant. The upshot was that UNESCO thought the complainant had failed to look after its interests properly.

He gave no account of his conduct in his memorandum to the Reports Board but in his complaint he seeks to refute the charge of misconduct, citing, among other things, the Appeals Board's report. He contends that, having failed to bring disciplinary proceedings against him, UNESCO is no longer free to level the charge.

Even if an organisation does not intend to charge an employee with misconduct in disciplinary proceedings, it is still free to consider whether his conduct warrants action of some other kind: see Judgment 1501 (in re Cesari) delivered this day and Judgment 1405 (in re Moore) under 3. Indeed in assessing performance before deciding whether to extend an appointment an organisation may not ignore conduct that suggests unsatisfactory service: see Judgment 1052 (in re James) under 5. Besides, the complainant had ample opportunity to have his say on the matter before a decision was taken: he stated his views before the text of the report had become final, before the Reports Board had taken up the matter, and again to the Appeals Board and to the Director-General.

He does not seriously contest the facts. In any event the Director-General had grounds for relying on them and concluding that the complainant's performance was unsatisfactory. In assessing the evidence and applying the rules to the facts he did not exceed his wide discretionary authority.

The complainant further pleads that the Appeals Board found nothing to blame in his conduct. The plea is unconvincing. The Organization's liability towards a third party may well be the fault of one of its employees. Even though the Organization corrected the outside consultant's contractual status during a period which is not material to this case, it was still bound to look at the complainant's conduct since then.

14. The complainant challenges other specific objections to his behaviour that appeared in the report approved by the Director-General. The Organization presses them.

On those issues too there was and is evidence against the complainant, particularly his first reaction on seeing his report and his admissions to the reporting officer's supervisor.

Again, in assessing the evidence and applying the rules the Director-General acted within the bounds of his discretion.

The charges against the complainant are so telling that even if there were inaccuracies on lesser, unimportant points the Tribunal is satisfied that the Director-General's conclusion was correct.

15. What the complainant is seeking to show is that the low rating of his performance is unlawful because the Director-General misused his discretion.

In determining fitness for duty the Tribunal will not replace the Organization's assessment with its own and has only limited powers of review: see Judgment 1052 under 4 and see 5 above.

The conclusion is that the Tribunal will not review the finding of unsatisfactory performance and insofar as the complaint impugns the decision on the appraisal it must fail.

Pleas challenging the non-renewal

16. The complainant is mistaken in saying that the Organization changed the grounds for not renewing his appointment. In fact it consistently relied on his unsatisfactory performance. Though it also says in its reply that he was stubborn and never going to behave otherwise in future, its purpose is simply to prove that it had no hope of seeing any improvement in the poor quality of service recorded in the report. Likewise, it mentions the injury caused by the Commaille case only as further evidence of poor performance.

17. Insofar as the reason for non-renewal is unsatisfactory performance the decision is the consequence of the appraisal, which is now beyond challenge.

So the only remaining issue is whether, notwithstanding his unsatisfactory service, there were special reasons for taking action of some other kind.

18. The complainant contends that the Organization failed to give him the written warning required by circular 1743 - referred to in 10 and 11 above - and so he lost the last chance that the circular required.

In Judgment 90 (in re Prasad) the Tribunal ruled on a case in which the defendant organisation's Manual provided for a written warning. It held:

> "A warning is different from a reprimand. It is not enough that the employer should be able to point to several occasions in the course of a long service when a rebuke has been administered. What is contemplated by the provision is that the employee should be told in what respects his service as a whole has proved unsatisfactory and warned that if he does not give better service, he faces the possibility of dismissal."

In Judgment 112 (in re Crapon de Caprona), although it is not stated that the organisation's rules required a written warning, the Tribunal held in 4 that "even if they were not frequent, the criticisms made of [the complainant's] work were nonetheless such as to make him aware of the failings of which he is accused", and that termination for unsatisfactory performance was justified. In Judgment 241 (in re Santoni), the Tribunal held in 2 that the termination was not unlawful because "despite written and oral warnings [the complainant's] work performance had not improved".

UNESCO's rules require written warning of a finding of unsatisfactory service. But the shortcomings pointed out in the warning need not be exactly the same as those the Organization identifies later: all that is needed is that the official should realise that on the whole he is not up to standard. Nor need the warning actually say that failure to improve may mean termination: that is implied in the very fact of the warning.

The complainant's first-level supervisor sent him memoranda, one on 10 June and the other on 16 June 1992, which left him in no doubt as to what was expected of him. The memorandum of 10 June took him to task for poor time-keeping, rudeness to his supervisor and to delegates, poor drafting of documents and acting without his supervisor's approval. The memorandum of 16 June followed a talk with his supervisor and again was about his "performance". The gist of it was that for the Organization's sake his supervisor would trust him and would "shelve", though not withdraw, "the criticisms about your attitude and behaviour and indeed warnings that I have had to address to you orally and in writing since I became acting head of division". Comments about the quality of his work had also been written on documents sent back to him. The conclusion is that he had quite sufficient warning about shortcomings in his performance and the risk of non-renewal. So it is immaterial whether the earlier criticisms are the same as those on which the decision rests. Furthermore, although the Organization's warning was sufficient, it was at liberty to cite prior incidents as well. It is plain on the evidence it adduces that even after being warned he did not improve. Even after the facts recorded in the appraisal report, that is after his return from sick leave, his work was no better. Late in June 1994, in considering whether he was to get a step increment the Assistant Director-General in charge of the Sector stated that "on returning from sick leave and annual leave, he did not carry out satisfactorily the tasks entrusted to him". The Reports Board confirmed that.

The plea about absence of warning is therefore without merit.

19. His other pleas about non-renewal may be taken together.

In his submission there were insufficient grounds for concluding so hastily that his appointment should be terminated in the Organization's interest. The Director-General overlooked the possibly adverse effects of his illness on his work; the shortness of the period covered by the appraisal, which included his sick leave; his long record of good service; the duty to treat him considerately; and the comments of the Appeals Board, the SPAB and the mediators in his favour. The Director-General forgot that he had even been in line for promotion. He was discriminated against in that other staff had done the Organization a disservice, yet got off scot-free. And - he concludes - someone with such seniority could have been let off with no more than relegation instead of suffering all the hardship of termination.

The Director-General was fully aware of those circumstances when he took the decision. He overlooked no essential facts and committed no mistakes of law or of fact. Even if, as the complainant says, UNESCO did not apply the rules in another case, that does not in itself entitle him to the same treatment. It is immaterial that promotion was contemplated but never came through.

The Director-General was free in exercising his discretion to weigh all the material circumstances of the case. He took the view that it was vital to maintain the quality and efficiency of the Organization's work. He did not misuse his authority in concluding that he had enough evidence at his disposal to suggest that there would be no improvement in performance and that termination was warranted.

The complaint is therefore quite devoid of merit.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

(Signed)

William Douglas Michel Gentot Egli

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL

TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANISATION

ADMINISTRATIVE TRIBUNAL

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FIRST SESSION

In re BAILLET, CERVANTES
and COOK (No. 3)

Judgment 1547

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Bernard Jean Raymond Baillet against the European Patent Organisation (EPO) on 6 January 1995, the EPO's reply of 27 March, the complainant's rejoinder of 2 May and the Organisation's surrejoinder of 6 June 1995;

Considering the complaint filed by Mr. Jean-Pierre Cervantes against the EPO on 6 January 1995, the Organisation's reply of 27 March, the complainant's rejoinder of 29 June and the EPO's surrejoinder of 3 August 1995;

Considering the third complaint against the Organisation filed by Mr. Steven Derek Cook on 6 January 1995, the EPO's reply of 27 March, the complainant's rejoinder of 28 June and the Organisation's surrejoinder of 2 August 1995;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the application by Mr. Cervantes for hearings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The EPO employs the complainants as patent examiners at grade A3 in its Directorate-General 1 (DG1) at The Hague. Mr. Cervantes is chairman of the local section of the Staff Union (SUEPO) of the European Patent Office, which is the EPO's secretariat. On 15 October 1992 the union used the Office's internal messenger service to send each of its members at The Hague an invitation to attend a general meeting on EPO premises on 20 October at 11 a.m. Not all the invitations were delivered: Mr. Baillet and Mr. Cook did not get them.

In a note dated 19 October 1992 the head of Internal Services told Mr. Cervantes that the Office would not be helping to distribute the invitations because union meetings were not allowed in the "core" period of the working day, between 10 and 11.30 a.m.

By a letter of 14 January 1993 Mr. Cervantes asked the President of the Office to declare the note "invalid" and to make sure that mail was properly delivered in future. By letters of 15 January Mr. Baillet, Mr. Cook and other members of the union asked the President to declare "unjustified" what they described as the "censoring" of their private mail, to promise that the Administration would not intercept it again and, if he refused, to treat their letters as internal appeals.

The President upheld the decision and the case went to the Appeals Committee. In a report dated 4 July 1994 the Committee recommended rejection. By letters of 11 October 1994 the Director of Staff Policy informed the complainants that the President had endorsed the Committee's recommendation. Those are the decisions they are impugning.

B. The complainants plead breach of Article 30 of the Service Regulations, which reads:

> "Permanent employees shall enjoy freedom of association; they may in particular be members of trade unions or staff associations of European civil servants."

Mr. Baillet says that by intercepting private mail from the staff union the Administration was guilty of censorship and acted ultra vires. Mr. Cervantes argues from precedent that to allow only "approved" communication between union members is to deny freedom of association. What the EPO did hampered freedom of speech and betrayed the Administration's resolve to cripple the union.

The complainants see the EPO's behaviour as a departure from usage. Mr. Cook observes that the Office had always allowed staff associations and social clubs unrestricted use of the messenger service. The complainants plead discrimination on the grounds that others had their invitations delivered.

Questioning the impartiality of one member of the Appeals Committee, they charge the Organisation with breach of Article 111 of the Service Regulations.

They want the Tribunal to set aside the President's decisions of 11 October 1994.

Mr. Baillet invites it to condemn "censorship" at the EPO and award him 5,000 German marks in moral damages and another 5,000 marks in damages for the "mishandling" of his case by the Appeals Committee.

Mr. Cervantes asks that it order the President to "stop censoring union mail" and award him 10,000 marks on that account, one mark for the flaw in the Committee's proceedings and 10,000 marks in costs. As president of SUEPO he seeks a further 85,600 marks in damages for moral injury to the union.

Mr. Cook seeks an award of at least 20,000 guilders in moral damages, including 10,000 for breach of Article 111. He claims at least 3,000 guilders in costs.

C. In its replies the EPO argues that the complaints are irreceivable because the complainants suffered no injury: its action made no "real" impact on union business or on freedom of association.

In subsidiary argument on the merits the Organisation says it is under no duty to distribute private mail, let alone unsealed messages that are against the rules. In any event it did not bar timely announcement of the meeting on the union's notice board or holding the meeting as scheduled.

The EPO denies breach of Article 111: had the impartiality of any member of the Committee been in doubt the staff representatives might have objected. In fact the Committee's recommendation was unanimous.

Mr. Cervantes' tirade against the Administration's treatment of the union is "mistaken" and "uncalled-for". Besides, he has no locus standi to claim damages on the union's behalf.

D. In their rejoinders the complainants challenge allegations of fact in the replies and press their claims. Again they express doubts about the impartiality of one member of the Appeals Committee.

Citing Judgment 1269 (in re Errani), Mr. Cervantes submits that as the union's "representative" he may seek damages on its behalf.

Mr. Cook gives examples of staff meetings held in the core period with support from the EPO.

E. In its surrejoinders the EPO enlarges on its pleas and comments on issues raised in the rejoinders. It maintains that the letters were unlawful insofar as they contained invitations to a union meeting to be held in working hours. It is the Appeals Committee, not the Administration, that decides under Article 111 whether to exclude a member whose impartiality is in doubt.

In the surrejoinder on Mr. Cook's case the EPO maintains that it may allow a meeting even in working hours if the organisers have applied for and got permission: SUEPO did not.

CONSIDERATIONS:

The facts

1. The three complaints are about the right of members of the Staff Union of the European Patent Office (SUEPO) to have union notices delivered.

2. On 15 October 1992 Mr. Cervantes, as chairman of SUEPO, sent out invitations to all members to attend a general meeting on 20 October 1992 at 11 a.m. in a room on EPO premises at The Hague. The messenger service delivered the invitations in the main building but not elsewhere. Mr. Baillet and Mr. Cook did not get them. By a letter of 19 October 1992 the head of Internal Services, who was in charge of the distribution of mail, told Mr. Cervantes that the Office would not be delivering the invitations. On 14 and 15 January 1993 the complainants sent letters of protest to the President of the Office. Letters of 19 January 1993 told them that the President was upholding the decision, and letters of 4 and 5 March that he was putting the cases to the Appeals Committee. On 4 July 1994 the Committee recommended rejection. The President rejected the appeals by decisions of 11 October 1994, the ones now under challenge.

Joinder

3. The Organisation applies for joinder. Since the complaints raise the same issues of fact and of law the application is allowed.

Receivability

4. The EPO objects that the complaints disclose no cause of action and are therefore irreceivable.

5. It observes that Mr. Cervantes, who purports to be acting for the union, may not claim damages on its behalf; he

may act only in his own name; and his interest in obtaining a promise of delivery of union mail is academic.

6. The purpose of Mr. Cervantes in bringing his complaint is to obtain the quashing of the President's decision of 11 October 1994 to reject his appeal of 14 January 1993. One plea in support of his internal appeal was that by refusing to deliver the "individual and private invitations" he had sent out the EPO was in breach of his rights as its employee. And the claims he puts to the Tribunal are plain enough: he wants it to declare the Organisation out of order and reaffirm his freedom of speech, particularly on matters of union business. He also believes that intercepting messages from the union was a breach of the freedom of association that Article 30 of the Service Regulations guarantees for everyone in the EPO's employ. The conclusion is that it is wrong to say he is acting for the union: he has brought his complaint in his own name; and he has a direct and rightful interest in the observance of freedom of association that Article 30 requires.

7. The EPO's general objection to receivability is that the complainants show no cause of action. It is saying that it has committed no breach in fact or in law of their freedom of association or right to carry on union business. In its submission the union has no right to its help in delivering union messages; the complainants, as members of the union, have no greater rights than the union itself and no right to the delivery of private mail by the Organisation; and they have suffered no discernible injury since what the EPO did had no real effect on union business or on freedom of association.

8. Precedent has it that an organisation has some latitude in affording facilities to a staff union and its decisions are not subject to judicial review. That is not so, however, where it is charged with breach of freedom of association. The Tribunal will indeed interfere if the effect of the impugned decision is to hamper the freedom of speech that any union must enjoy. Refusal to deliver invitations to a union meeting is unquestionably a breach of the privacy of mail and of the freedom of speech that is part and parcel of freedom of association. The EPO's pleas that the union had no right to delivery and that no injury was caused go rather to merits than to receivability. The conclusion is that because the complainants seek a ruling on the lawfulness of refusal to deliver union mail and because such refusal is actionable the objection to receivability must fail.

The membership of the Appeals Committee

9. A preliminary issue is the complainants' objections to one member of the Appeals Committee. They cite Article 111

of the Service Regulations: the impartiality of any member may be challenged whenever he is "required to take part in a case in which he might have a personal interest or in respect of which he participated in preparing the decision under appeal ...". They contend that Mr. G. Schwabe should not have sat on the Committee because he was in charge of the distribution unit; the President's decision was one of direct concern to that unit and while the case was pending Mr. Schwabe was asked to draft rules on the use of the messenger service.

10. The plea fails. It is plain from the text that the guidelines that Mr. Schwabe drew up on the handling of mail are general in purport: they are not about the particular case of union mail, and they say that at each duty station mail may be processed to suit local circumstances. Besides, the Committee reported on 4 July 1994, whereas the guidelines did not go out until 29 August 1994, and it is by no means sure that they were written by the earlier date. The Committee's members - including the staff representatives - were of one mind in rejecting the charges of partiality against Mr. Schwabe.

The merits

11. The gist of the complainants' case in support of their claims to the quashing of the impugned decisions is breach of Article 30 of the Service Regulations, which is quoted in B above. They see the interception of the invitations as bare censorship and part of a policy of the EPO's to curb the union. The Organisation's answer is that the mail was neither "personal" nor even "individual and private invitations" but "unsealed announcements of a meeting", the same for everyone and no mystery. Besides, having concluded no agreement with the Organisation for the purpose the union has no right to have it deliver a summons to such a meeting.

12. The notices were not private mail but invitations sent to each of the complainants by name to attend a general meeting. To be sure, the EPO had no formal agreement with the union about facilities such as the distribution of a summons to a meeting. But it admitted to the Appeals Committee that its consistent practice since 1992 had been to distribute any unsealed unofficial internal mail, whether private or not, save any text containing a personal attack on someone. Was such usage binding in law? As Judgment 421 (in re Haghgou) said, for example, a usage will be binding if staff have come to rely on it.

13. The plain expectation of the staff was that the EPO would deliver notices from their union without let or hindrance. The Organisation does not deny the practice, but just pleads limits to it: the union's invitations offended

against the rule that a general meeting must be held outside core working hours.

14. Yet the EPO did not treat the offence - the holding of the meeting as scheduled - as serious enough to constitute an abuse: in the event it authorised the meeting at the time announced and imposed on those who attended neither any penalty nor even the obligation to make up the time spent off work. Besides, by thwarting the delivery of union notices to staff outside the main building the EPO denied some, and not others, the freedom of association they were guaranteed by Article 30. It thereby discriminated against them. The conclusion is that the complaints must succeed.

15. The claim by Mr. Cervantes to an award of damages to the union is irreceivable because his complaint is in his own name. And though the individual claims by the three complainants are formally sound, the amounts they claim cannot be awarded: the meeting did take place and there is no evidence of any particular injury. Each is awarded 500 German marks in damages for moral injury.

16. Having won their case, they are entitled to costs, and the Tribunal awards them 500 marks each. Their other claims are dismissed.

DECISION:

For the above reasons,

1. The President's decision of 11 October 1994 is set aside.
2. The EPO shall pay each complainant 500 German marks in moral damages.
3. It shall pay each complainant a further 500 marks in costs.
4. Their other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

(Signed)

William Douglas E. Razafindralambo Egli

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

EIGHTY-FIRST SESSION

In re LEE

Judgment 1548

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Tommy Lee against the Food and Agriculture Organization of the United Nations (FAO) on 14 October 1995, the FAO's reply of 25 January 1996, the complainant's rejoinder of 2 March and the Organization's surrejoinder of 26 April 1996;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The Conference of the FAO and the General Assembly of the United Nations established the World Food Programme (WFP) under resolutions they adopted in 1961.

The complainant, a citizen of the United States, joined the staff of the Programme in July 1985 under a fixed-term appointment as assistant project officer at grade P.2 at Bangui, in the Central African Republic. In 1988 the WFP transferred him to Chad, where he got promotion to P.3 in January 1990. In March of that year he became the WFP's project officer in Uganda. In September 1991 he took up a post as its project officer at Khartoum.

In a memorandum of 25 November 1992 the officer in charge of the Operations Department informed him that he would recommend withholding his within-grade step increment (WIGSI) for 1 January 1993 owing to the "unacceptable" quality of his work and working relations. In a letter of 21 December 1992 the Deputy Executive Director of the Programme told him the increment was being withheld, asked him to improve his performance and warned him that he might not get another extension of appointment after its normal expiry date, 30 June 1993, if his performance and conduct did not come up to standard "within the next few months".

In discussions with senior officials at the WFP's headquarters at Rome in January 1993 he agreed to work towards specific goals in the months ahead and have his performance evaluated in a special appraisal report.

He then returned to duty in the Sudan, where he learned in June 1993 that the Administration had failed to complete his special appraisal report before transferring his supervisor to another duty station. To give his new supervisor time to draft the appraisal it extended his contract by six months.

A special report written by that supervisor and dated 29 December 1993 said that his performance since August of that year did not warrant renewal, and in a letter to him of 11 February 1994 the Director of Personnel of the Programme confirmed the decision not to extend his appointment. The complainant left the FAO on 28 February 1994.

On 26 April 1994 he lodged an appeal with the Director-General of the FAO. By a letter of 22 June 1994 the Executive Director of the WFP rejected it on the Director-General's behalf. On 14 August 1994 he put his case to the Appeals Committee. In its report of 12 May 1995 the Committee recommended rejection.

By a letter of 6 July 1995 the Director-General endorsed the recommendation of the Committee. That is the decision he is impugning.

B. The complainant submits that the Director-General had ample grounds for renewing his contract. He charges the Organization with misuse of authority, procedural mistakes, failure to abide by the rules on performance appraisals, personal prejudice, overlooking essential facts, drawing mistaken conclusions from the evidence, breach of due process, tampering with evidence, taking covert "disciplinary" action and infringing his right to a hearing.

He seeks the quashing of the impugned decision, reinstatement "without detriment" to his career prospects or, failing that, awards of gross salary and benefits from 1 March 1994 up to the date of the Tribunal's judgment and of three years' gross salary in professional and moral damages plus interest at ten per cent a year, also from 1 March 1994. He requests payment of the within-grade step increment "due" from 1 January 1993 to 28 February 1994 plus interest at the same rate, removal of adverse comments from his personal file, and material and moral damages in the amount of his full salary and other benefits at his last duty station "at a step and WIGSI determined according to the date of his original recruitment", plus interest again at ten per cent a year, from the date of separation. He claims 10,000 United States dollars in costs "plus interest" from the same date.

C. In its reply the FAO contends that the complaint is in part irreceivable and in any event devoid of merit. Since the complainant failed to appeal against the withholding of his within-grade step increment within the prescribed time limit, his claim to back payment of the increment is irreceivable.

Under FAO Manual section 305.5123 fixed-term appointments do not confer any right to extension and expire at the specified date without notice or indemnity. The Organization gave him every opportunity to improve after the "marked degeneration" in his conduct and performance in 1990. In the absence of improvement, non-renewal was the only proper solution, the situation being "totally unacceptable".

D. In his rejoinder the complainant enlarges on his pleas and also claims a continuing appointment at grade P.4 or six years' salary and benefits. He asks the Tribunal to order the FAO to send him documents necessary to enable him to bring his car out of the Sudan.

E. In its surrejoinder the FAO observes that the rejoinder contains no new material facts and maintains its pleas in the reply.

CONSIDERATIONS:

1. The complainant joined the FAO on 20 July 1985 on a fixed-term appointment for three years. He was employed as an assistant project officer at grade P.2 under the World Food Programme (WFP) which the FAO and the United Nations had jointly established. The FAO granted him another two fixed-term appointments. The second of them expired at 30 June 1993 but was extended to 31 December 1993 and for the last time to 28 February 1994. The complainant is challenging the Organization's refusal to renew it thereafter.

2. The system for the appraisal of the performance of FAO staff provides for five overall ratings: exceptional, where performance is consistently outstanding; excellent, where it exceeds expected standards; good, if it meets expected standards; improvement desired, if it fails to meet expected standards in all respects; and unsatisfactory.

3. The complainant's performance from December 1985 to September 1990 was duly assessed and the assessment formed the subject of four staff performance appraisal reports. One of them rated his performance as excellent, i.e. exceeding expected standards, and the other three described it as meeting expected standards. He was promoted to grade P.3 at 1 January 1990.

4. There was no appraisal of his performance in the period from October 1990 to September 1991, when he was stationed in Uganda. On 30 November 1990 the Director of Operations in Uganda saw him and questioned him orally about "reports" that he had made "some very negative and indeed destructive comments" on 9 August 1990 to the Representative of the United Nations Children's Emergency Fund (UNICEF) and on 20 November 1990 to an official of the Government of Uganda about the Director's management of WFP operations in that country. The complainant denied the Director's allegations. On 4 December 1990 the Director sent him a memorandum calling for his written comments on the "reports". He did not reply, and the Director took no action. Much later however, in letters dated 20 May 1991, the two informants stated their allegations for the first time in writing, and on 22 May the Director made a written record of his meeting of 30 November 1990 with the complainant. The complainant was not given copies of the informants' letters.

5. On 24 July 1991 the Director of Personnel informed the complainant that senior headquarters staff were dissatisfied with his conduct, especially his "inter-personal relationships" with his supervisors; that if he did not improve "in this area" his appointment would not be renewed after 30 June 1993; and that his performance and conduct would be "closely monitored" in performance reports. As from September he was transferred to the Sudan.

6. On 25 June 1992 the complainant's reporting officer signed a report assessing his performance since 20 September 1991. In one section it said he "meets expected standards" as to six out of eight "specific performance assessment work goals" and was "below expected standards" as to the other two. The report form gave instructions for reporting officers which said that that part of the assessment should be done "in the course of a work review discussion with the staff member"; no performance rating was valid without comment to support it; and the overall assessment must be consistent with "specific performance assessment". In the complainant's case, although there was a supporting comment about delays in projects it was relevant to only one of the ratings; and the overall assessment was that he did "not meet expected standards in all respects". The next section of the report, headed "general performance factors", assessed his "job knowledge and competence" as "good", and against "personal effectiveness", "inter-personal effectiveness" and "performance as a supervisor" put "improvement desired". The form failed to say how many staff he supervised.

7. The complainant having refused to comment, the acting WFP Representative forwarded the report to the Regional Manager of the Mediterranean and Middle East Bureau of the WFP in Rome. In an accompanying letter dated 22 July 1992 the Representative

cited an allegation by another official that the complainant had disclosed confidential information to the local authorities in August 1991. The Representative recommended transferring him immediately from the Sudan. The Regional Manager sent the report on to the Director of Personnel with a memorandum dated 7 August 1992 saying that he found the complainant's performance to be still "below expected standards", had objected in the first place to assigning him to the Sudan, and wanted him to leave the country.

8. At the invitation of the Deputy Director and Chief of the Personnel Service the complainant submitted detailed comments on the report on 9 September 1992. He observed that his reporting officer had "supervised" him for only four months of the period covered by the report and had refused to discuss any section of it with him.

9. By a memorandum of 30 September the reporting officer told the Director of Operations that he had spent "over one hour" discussing the report with the complainant but saw no need to answer his comments. The reporting officer maintained his assessment. In a letter of 8 October 1992 to the Deputy Director and Chief of the Personnel Service the Director expressed agreement with the reporting officer and forwarded the report together with several memoranda accusing the complainant of being absent without leave and of lacking professional competence.

10. The Director of Operations gave the complainant the report for signature but the complainant refused to sign on the grounds that the text was not the original one but contained several major amendments. On 1 December 1992 the Director entered his own comments in the report. Those comments were inconsistent with his previously unqualified endorsement of the reporting officer's assessment. Moreover, they supported some of the complainant's own objections by saying that since the reporting officer had been his supervisor for only four months his previous supervisor should comment on his attainment of four specified work goals and that it was difficult both to decide whether he or the reporting officer was to blame for the project delays and to rate him as a supervisor. The Director recommended giving him, after discussion, precise goals for his work from February to June 1993 and only then making a final assessment of his performance.

11. By a letter of 21 December 1992 the Deputy Executive Director of the WFP told him that his "within-grade salary increase" for 1993 would be withheld under Manual paragraph 315.323 on the strength of documents that included those sent by the Director of Operations on 8 October 1992. The complainant protested in a letter of 5 January 1993 to the officer in charge of the Development Division saying that he had "never seen nor been made aware of most" of the documents in question.

12. A letter dated 15 February 1993 went from the acting Director of the Development Division at headquarters to the Director of Operations in the Sudan and a copy of it was sent to the complainant. It referred to discussion with the complainant and headquarters in January 1993 on his performance and conduct. It said that a "special assessment of his performance" should be made by 15 May on the standard report form. It explained:

> "In order to weigh considerations regarding the extension of his contract ... a consistently superior level of performance will be expected ... In at least some key result areas, specified and agreed to in advance, [he] will have to exceed expected standards. He should at least meet expected standards with respect to the other objectives.
>
> His general performance factor assessment must at least be good on all accounts.
>
> Attention is drawn to the requirement that each individual rating must be justified in writing."

13. On 9 February 1993 the Director of Operations had urgently asked the complainant to write "project completion reports" on three projects. Yet on 22 November 1992 the Director had himself acknowledged in a memorandum to the chief of the Evaluation Service in Rome that it would not be possible to provide such reports: "all historical memory", he said, had been "lost" because of "huge emergency operations" in the Sudan, where the country office was unable "to undertake such cumbersome research work". On 22 February 1993, it seems, a deadline for completion of those reports was agreed, and by August 1993 the complainant had submitted all three. There is no suggestion that his performance of the assignment was found wanting in any way.

14. Despite the decision to make a special assessment, the Regional Manager at headquarters commented on 10 March 1993 in a standard form appraising the complainant's performance in 1991-92 that he agreed with the reporting officer's assessment and the detailed comments by the Director of Operations. He observed that the complainant had "not been able to perform at the level expected, and his inter-personal relationships were particularly questionable". That report was not, as the procedure required, sent for signature to the complainant thereafter.

15. In a letter of 25 March 1993 to the acting Director of the Development Division the complainant pointed out that the special assessment had not even begun. He was told in a reply of 23 April 1993 that, though there was "no stepping back from the framework for assessment" agreed on in January, there

could be "the necessary accommodation without jeopardising fairness or objectivity" if the departure of the Director of Operations from the Sudan required "adjustments within this framework". In June the complainant inquired about the extension of his contract. By a letter of 24 June 1993 the acting Director of the Development Division said that because of the unforeseen transfer of the Director of Operations "it has not been possible to complete the performance appraisal exercise; that in order to "continue the framework of assessment" his appointment was extended by six months; and that the new Director of Operations would be supervising him directly and would assess his performance in November 1993, as the Director of the Development Division had informed him in his letter of 15 February 1993, mentioned in 12 above.

16. Although that extension made it quite feasible to assess the complainant's performance from 1 July 1992 to 30 June 1993 in a normal report, no such assessment was made.

17. By a memorandum of 28 August 1993 the new Director of Operations assigned the complainant the duties he was to perform up to November 1993, but he did not indicate "at least some key result areas" which the letter of 15 February 1993 from the Director of the Development Division had said should be identified. Nor was anything said to the complainant about any aspect of his performance while he was carrying out those duties, which he completed on schedule. Only under cover of a letter of 29 December 1993 to the Regional Manager did the new Director of Operations make the special assessment, and his "overall rating" was: "Performance does not meet expected standards in all respects". The Director did not use the standard form and did not make his assessment in the course of any "work review discussion" with the complainant. The assessment was sent on 30 December to the complainant, who was told to comment and return it by the end of the day. He signed the Director's assessment and returned it, neither commenting nor objecting to lack of time in which to do so.

18. In a telex of 6 January 1994 the Director of Personnel Services informed the complainant that his appointment was extended to 28 February 1994 and that "informal communication to date indicates that the assessment will not indicate above-average performance". In his reply of 20 January the complainant expressed disagreement with the special assessment. On 11 February 1994 the Director of Personnel Services informed him that his appointment would not be further extended: the view expressed by the Director of Operations in the letter of 15 February 1993 that his performance was not up to standard had been confirmed by the Regional Manager and the Director of the Operations Department - whose comments, however, were never made available to the complainant.

19. The complainant made detailed comments in memoranda of 23 and 25 February 1994 that he sent by fax to the Director

of Operations about the special assessment and asked for review of the decision of 11 February. The decision was confirmed on 1 March by the Director of Personnel Services and an appeal by him dated 26 April to the Director-General was rejected as unfounded on 22 June 1994. He appealed to the Appeals Committee on 14 August. In its report of 12 May 1995 the Committee recommended rejection. It found ample justification for the non-renewal, and indeed even for having let the complainant go much earlier "given the incidents in Uganda and his continued unsatisfactory behaviour once transferred to the Sudan" despite the FAO's efforts to give him further opportunities, including the extension of the period of assessment, of changing his behaviour and working better. On 6 July 1995 the Director-General accepted that recommendation and rejected his appeal. That is the decision he is impugning.

20. The FAO submits that although the complainant's work was, with some reservations, found generally satisfactory at first, there was "marked degeneration" from 1990 in both his work and his conduct; "countless efforts were made by [his] superiors to redress the situation"; "he was fully informed in a timely manner of the reasons [for] dissatisfaction and countless warnings were given"; he was given every reasonable opportunity to show his mettle and "improve his performance and his relations with his supervisors as well as with government officials"; and it was because all those efforts proved futile that his appointment was not renewed.

21. Those being the grounds for non-renewal, the burden is on the Organization to show that its decision rested upon proper appraisal of the complainant's performance. Although it warned him that it would be assessing his performance in the Sudan by means of the usual formal reports, it failed to complete a single process of reporting for the whole period, from October 1990 to November 1993, in which it alleges unsatisfactory performance. There was no such report at all for 1990-91. The one for 1991-92 was begun but not completed; it showed omissions, errors and irregularities; and during the process of appraisal the complainant's supervisors made, not on the report form, adverse comments about him which he never saw. And the fact that on reading his objections the Director of Operations had second thoughts and recommended further assessment suggests that that report was at best inconclusive, if not defective. Lastly, the report for 1992-93 was not made out even when it became quite clear that that was feasible. All the reports up to September 1990 having been satisfactory, the Organization's failure to have proper appraisal reports made since then is a flaw in the decision.

22. The special assessment did not remedy that flaw. True, the letter of 15 February 1993 prescribed safeguards of fairness and objectivity, and the complainant was twice reassured on that score. One safeguard was that "key result

areas" should be agreed beforehand; another that the standard report form would be used so as to let him have the benefit of the normal process of appraisal, including discussion with supervisors and disclosure of any adverse comments. But since those safeguards were not observed, the special assessment too was flawed.

23. The consequence of the delay in the special assessment was to deny the complainant the benefit of any appraisal of the work which he did from February to August 1993, and about which there had been no adverse comment. The decision not to renew his appointment was made in disregard of that period of seven months and based upon an assessment of his performance only in the following three months.

24. The FAO's reply and the conclusions of the Appeals Committee show that one point that influenced the decision was the charge against the complainant of unsatisfactory behaviour, especially poor relations with supervisors in Uganda and the Sudan. But he denied some of those allegations; others he was not even told of; and none was pursued. By acting on such allegations the FAO denied him due process.

25. The conclusion is that the impugned decision, being tainted with procedural errors and irregularities, denial of due process and disregard of material facts, cannot stand. In lieu of reinstatement the complainant will be awarded damages in a sum equivalent to two years' salary and allowances at the rates prevailing in February 1994. He claims retroactive payment of the within-grade salary increase that by virtue of its decision of 21 December 1992 the FAO withheld as from 1 January 1993. But since he failed to file an internal appeal against that decision the claim is irreceivable under Article VII(1) of the Tribunal's Statute for failure to exhaust the internal means of redress.

DECISION:

For the above reasons,

1. The Director-General's decision of 6 July 1995 is quashed.

2. The FAO shall pay the complainant damages in a sum equivalent to two years' salary and allowances at the rates prevailing in February 1994.

3. It shall pay him 1,000 United States dollars in costs.

4. His other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

Wm Douglas
William Douglas

Mella Carroll
Mella Carroll

Mark Fernando

A.B. Gardner
A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL

TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANISATION

ADMINISTRATIVE TRIBUNAL

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FIRST SESSION

In re LOPEZ-COTARELO

Judgment 1549

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Jesús López-Cotarelo against the International Atomic Energy Agency (IAEA) on 9 May 1994 and corrected on 18 April 1995, the Agency's reply of 25 July, the complainant's rejoinder of 6 October 1995 and the IAEA's surrejoinder of 11 January 1996;

Considering Articles II, paragraph 5, and VIII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Spaniard born on 29 November 1933, joined the staff of the IAEA on 19 June 1988 under a three-year appointment. He was a nuclear power plant engineer at grade P.4. On 15 January 1990 he was promoted to grade P.5 as head of the Middle-East and Europe Section of the Division of Technical Co-operation Programmes (TCPM). The Agency replaced his then appointment with another that was to expire at 14 January 1993. He had it extended to 30 November 1993, when he reached the age of retirement and left.

On 16 October 1990 the IAEA issued a notice of vacancy, No. 90/068, for a post as director of a division known as TCPM. The complainant applied on 7 December 1990. The post was to be free from 1 June 1991 and the closing date for applications was 15 February 1991.

By a letter of 6 September 1991 the Director of the Division of Personnel told the complainant that the post would not be vacant until early in 1992, that selection would go on until February and that he should say whether he was still in the running. In his reply of 10 September 1991 he said he was.

The IAEA extended the appointment of the then director to 31 December 1992. By a letter of 8 December 1992 the Director General told Mr. Paulo Barretto, who was at the time Director of the Division of Technical Co-operation Implementation, that after consulting the Board of Governors he was appointing him Director of the Division of Technical Co-operation Programmes as from 1 January 1993 without change of grade or step.

By a letter of 18 December 1992 the Director of the Division of Personnel told the complainant that an inside candidate had been put on the post. In a letter of 11 January 1993 the complainant asked the Director to let him know whether the successful candidate had been "transferred or appointed" and had applied by the deadline. The Director's answer of 15 January was that it was in line neither with custom nor with the rules on safeguarding "personnel data" to let one candidate have such information about another.

By a letter dated 22 February the complainant asked the Director General to reverse the appointment of Mr. Barretto. On 22 March the Director General upheld his decision. By a letter of 21 April the complainant put his case to the Joint Appeals Board. In its report of 28 January 1994 the Board recommended rejection but invited the Director General to review the procedure for announcing vacancies and see to it that he got timely written notice of applications for any post of director. By a letter of 11 February 1994 the Director General informed the complainant that he had endorsed the Board's recommendations. That is the decision impugned.

B. The complainant pleads breach of the rules on appointment to advertised posts as set out in Part II, Section 3, of the Agency's Administrative Manual. He believes that Mr. Barretto did not apply for the vacancy or at any rate not in time. Nor did he supply the required curriculum vitae. The Division of Personnel did not record his alleged application and, although the Director General did consult the Board of Governors on the applications duly filed, Mr. Barretto was not on the computer list. So the IAEA broke its own rules.

The appointment of Mr. Barretto offended against equality of opportunity, a principle that Judgment 729 (in re Ilomechina) affirmed, and the attempt to put things right retroactively was a breach of good faith.

The complainant claims the quashing of the decision of 11 February 1994, the proper resumption of the process of selection, moral damages and costs.

C. The Agency replies that the complaint is irreceivable because it shows no cause of action. For one thing, the complainant fails to establish that he would have qualified for the post; for another, had he been appointed he would in any event have had to leave the Agency by 30 November 1995, no-one having a right to stay on more than two years after sixty, the normal age of retirement.

The IAEA produces a letter of 8 May 1992 from Mr. Barretto asking the Director of Personnel to consider him for the post.

On the merits the Agency points out that since Mr. Barretto was already in its employ the Division of Personnel had his curriculum vitae in its records and did not need to ask for one. The Director General did consult the Board of Governors, at its meeting of 3 December 1992, about filling the vacancy.

The Agency admits to not following to the letter the rules on closing dates and the recording of applications in the Division of Personnel. But the rules, it says, are just administrative guidelines and do not entail discarding late or unrecorded applications. In any event the complainant suffered no injury since the Administration duly considered his merits.

D. In his rejoinder the complainant answers the Agency's objections to receivability. He says he is surprised at its producing what purports to be an application of 8 May 1992 from Mr. Barretto. He challenges the authenticity of that letter, especially since the Appeals Board found that the application had gone astray. He says the Agency had a duty to comply with the binding rules in the Manual. He enlarges on his pleas about flagrant flaws in the process of appointment.

E. In its surrejoinder the IAEA cites precedent in support of its contention that a procedural flaw is fatal only if without it the decision would probably have been different. The outcome would have been no different even if the Agency had strictly abided by all the rules.

CONSIDERATIONS:

1. The complainant joined the staff of the Agency on 19 June 1988 under a fixed-term appointment as a nuclear power plant engineer at grade P.4. On 15 January 1990 he was promoted to a post as head of section at grade P.5 in the Division of Technical Co-operation Programmes (TCPM). On

16 October 1990 the Agency issued a vacancy notice for the post of Director of TCPM. The deadline for applications was 15 February 1991 and the complainant applied on 7 December 1990.

The appointment of the official who held the post was to expire at 1 June 1991, but for exceptional reasons the Agency extended it to 31 December 1992. In the meantime it neither amended the notice nor changed the deadline nor issued any further notice about the post.

2. By 15 February 1991, the stated deadline, there were 17 applications. On 15 July 1991 the Division of Personnel made a second list of 31 candidates.

On 6 September 1991 the Director of Personnel informed all of them that the process of selection would not be over before February 1992 and asked whether they were still interested.

On 10 September 1991 the complainant said he was.

3. By a letter dated 8 May 1992 another inside candidate, Mr. Barretto, the then Director of the Division of Technical Co-operation Implementation (DIR-TCIM), appears to have applied for the post.

A letter of 18 December 1992 told the complainant that after consulting the Board of Governors the Director General had put an inside candidate on the post, that the post of Director of TCIM was vacant, and that since the requirements for both posts were much the same he would also be considered for the other one unless he said he was not interested.

Without answering that question he asked the Director of Personnel by a letter of 11 January 1993 whether the new Director of TCPM, Mr. Barretto, had been "appointed" or "transferred".

Having got no satisfactory answer, he wrote to the Deputy Director General in charge of Administration on 25 January and again on 17 February, but to no avail.

4. On 22 February he asked the Director General himself to reverse Mr. Barretto's appointment.

His request was refused on 22 March and he put his case to the Joint Appeals Board. In its report of 28 January 1994 the Board recommended rejection.

The Director General rejected his claims by a decision of 11 February 1994, which he now impugns.

Receivability

5. The IAEA objects to receivability on the grounds that the complaint discloses no cause of action: the complainant has not shown that he was fit for the advertised post and, even if he was, he had to retire by 30 November 1995 anyway.

Those pleas fail.

6. As the Tribunal has held, an official of an international organisation who applies for a vacancy is entitled to have his application considered and assessed according to the set procedure once the organisation admits it under the terms of the vacancy notice. It may not deny that an applicant has a cause of action after it has appointed someone else, especially if the applicant is challenging the appointment on the grounds of breach of his rights in failure to apply the proper procedure: see for example Judgments 1316 (in re van der Peet No. 17) under 4 and 1359 (in re Cassaignau No. 4) under 6 and 7.

So there is no merit in the contention that the complaint discloses no cause of action.

7. Nor will the Tribunal uphold the plea that because the complainant was not qualified for the post his complaint is irreceivable: that issue goes to the merits.

8. The Agency's other objection to receivability is that the complainant has already retired and so was not eligible for appointment. He explains that it is because he retired on 30 November 1993 that he is claiming only moral damages. The Agency points out that he would in any event have had to retire at the age of 62, by 30 November 1995. He retorts that he might nevertheless have had the exceptional benefit of extension past that age. Whether he still has any interest in the quashing of someone else's appointment is moot; but he still has an interest in exposing a breach of due process which may warrant an award of damages: see Judgment 729 (in re Ilomechina).

The merits

9. The dispute turns on the lawfulness of the appointment to the advertised post and of the process of selection.

What power of review does the Tribunal have in such matters? As it has often held, an appointment by an international organisation is a discretionary decision. Being subject to only limited review, it may be set aside if it shows some fatal flaw, and breach of a rule of form or of procedure will amount to such a flaw. The Tribunal will be especially wary in such cases: it will not replace the organisation's rating of the candidates with its own. But any applicant, whatever his hopes of success, must be considered in good faith and in line with the basic rules of fair competition.

10. The complainant pleads several fatal flaws in the appointment of Mr. Barretto.

The appointing authority was wrong, he says, to consider an application that came in after the deadline, and there were also procedural flaws: the applicant supplied no curriculum vitae; the Agency did not record his application; there was no proof of receipt of it; and he was not on the computer list that went to the Board of Governors.

Since the first of those pleas succeeds the Tribunal need not take up any of the others.

11. When an organisation wants to fill a post by competition it must comply with the material rules and the general precepts of the case law.

This case turns on whether an application lodged after the deadline may be allowed.

12. The Agency mentions no written provision that may authorise it to do so.

Paragraph II.3.48 of the Administrative Manual reads:

> "The closing date to be established for the submission of applications shall, normally, be four months from the date of issue of the vacancy notice for posts in the Professional and higher categories ..."

That rule is about the deadline to be set in the notice of vacancy for entering a competition, not about the validity of late applications or the circumstances, if any, in which such application is allowable.

The Agency argues that the practice of the Personnel Department is to go on allowing applications until the whole process of selection is over.

But such practice cannot make good the lack of a rule or of an explanation in the announcement of the competition. An undeclared practice fails to provide the openness that competition requires. And when the notice demands timely application the practice offends against the rule, affirmed in the case law, that after the process of selection has begun the terms of competition may not be changed: see Judgment 1158 (in re Vianney) under 6.

13. The purpose of competition is to let everyone who wants a post compete for it equally. So precedent demands scrupulous compliance with the rules announced beforehand: patere legem quam ipse fecisti. See Judgments 107 (in re Passacantando), 729 (in re Ilomechina), 1071 (in re Castillo), 1077 (in re Barahona), 1158 (in re Vianney), 1223 (in re Kirstetter No. 2) and 1359 (in re Cassaignau No. 4).

Judgment 729 required observance of the announced deadline on the grounds that officials were entitled "to hear of the vacancy early enough to be able to make up their minds and, if they so wanted, get their application in by the deadline". So the deadline does matter.

So does equal opportunity when applications come in late. Some apply in time; some may have wanted to apply but were too late. If the organisation considers a late application it gives the impression of preferential treatment. Someone who has applied in time sees therein a bending of the rules and may feel that the late applicant has had inside information about the earlier applicants and can act accordingly, perhaps even at the prompting of the Administration. And to those who might have wanted to apply after the deadline the acceptance of a late application will look like favouritism: for want of an announcement they may not have realised that application was still allowable and might succeed.

Letting late applications through offends against equality of treatment, as the Tribunal has often held: "at every stage of the competition ... every candidate must be treated on an equal footing ..." (Judgment 1071). An approach that tends to favour outside candidates under short-term appointments over candidates from within the organisation gives "inside candidates the impression of subterfuge ... It is in the [organisation's] interests to avoid arousing suspicion" of that sort: Judgment 1077. Even though the organisation "may have believed that it was acting in its own best interests ... it was not entitled to achieve that purpose by a process of selection that cancelled one stage of the procedure it had already announced. So long as the notice remained valid the organisation was bound by the wording of it and was not free to amend it secretly. The only proper way of doing so would have been to withdraw the notice altogether and open a new competition on terms that better matched actual requirements. The procedure followed must have left the complainant with the unfortunate impression that he had not been given a fair chance to compete": Judgment 1223.

Although an organisation's rightful interests may warrant considering late applicants, it must, whenever a competition is required or desired, announce a new deadline in the same way as it did the vacancy. It will then commit no breach of equality and the competition will be seen as fair.

14. There is no need to consider whether exceptional circumstances may warrant allowing a late application, without announcing a new deadline, simply by so informing those who applied in time. Perhaps that would do if someone was late through no fault of his own and applied just after the deadline. But that was not Mr. Barretto's case: there is no suggestion that he missed the deadline through no fault of his own, and he applied long thereafter.

15. The whole business gave the unsuccessful applicants the impression of a bending of the rules to let through a late applicant. Indeed the evidence the complainant has provided bears that out.

The conclusion is that there was breach of the material provisions.

16. The complainant implicitly acknowledges that having retired on 30 November 1993 he himself does not stand to gain from resumption of the competition. No other complainant has challenged Mr. Barretto's appointment or questioned his qualifications. As in like cases (Judgments 729, 1071 and 1077), the Tribunal finds it inadvisable to set aside the appointment. Instead it will award the complainant damages under Article VIII of its Statute. All he claims is moral damages, and the amount is set *ex aequo et bono* at 3,000 United States dollars.

Having succeeded in the main, he is entitled to 10,000 French francs in costs.

DECISION:

For the above reasons,

1. The Agency shall pay the complainant 3,000 United States dollars in moral damages.
2. It shall pay him 10,000 French francs in costs.
3. His other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

(Signed)

William Douglas E. Razafindralambo Egli

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

EIGHTY-FIRST SESSION

In re MERCHAN

Judgment 1550

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Nelson Merchan Cely against the Pan American Health Organization (PAHO) on 14 February 1995 and corrected on 13 April, the PAHO's reply of 7 August, the complainant's rejoinder of 28 September and the Organization's surrejoinder of 21 December 1995;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Colombian born in 1939, joined the staff of the PAHO in 1962 under a career appointment. At the material time he held a post of administrative assistant II at grade G.7 in the office of the World Health Organization (WHO) and the PAHO in Colombia. His duties included issuing cheques to the office's General Service staff and short-term consultants.

Alongside his official duties the complainant had for several years been exchanging currencies for people who were connected with the PAHO in various capacities. Among such customers was the head of the office, the WHO/PAHO Representative in Colombia. Though he did not charge for the service, he made a profit by letting his customers have only the official rate of exchange but taking advantage of the more favourable one some banks offer to international civil servants like himself. Two such banks lent him by revolving credits the funds he required for the purpose of his currency dealings.

In June 1992 the PAHO/WHO Representative told him to stop those dealings and in a fax of 17 February 1993 informed the Chief of Administration that, as he had "learned" from consultants, the complainant was "using his status as a staff member" to negotiate cheques and, despite a promise to put an end to the business, was still carrying it on.

By a letter of 19 March 1993 the Chief of Personnel informed the complainant that because he was treating the office as an "exchange agency" he was suspended from duty for thirty days under PAHO Staff Rule 1120 pending investigation.

In his reply of 25 March the complainant refuted the charges and explained what he had been doing.

By a letter of 15 April 1993 the Chief of Personnel charged him with serious misconduct under Staff Rules 1075.2 and 1130 on grounds of insubordination, conflict of interest and abuse of the diplomatic pouch. He answered the charges in a letter of 21 April to the Chief of Personnel.

By a letter of 5 May 1993 the Chief of Personnel gave him notice of dismissal for serious misconduct under Staff Rule 1075.2 at 10 May.

The complainant appealed on 2 July 1993. In a report dated 30 September 1994 the headquarters Board of Appeal in Washington, D.C. recommended a more lenient penalty than summary dismissal, which it considered disproportionate in view of the Administration's failure to act when his activities had been disclosed to it in an audit report of December 1991. It proposed reinstating him at a lower grade.

By a letter of 16 November 1994, which he impugns, the Director upheld the earlier decision.

B. The complainant submits that his dismissal is unlawful. He has two main pleas.

Taking up the charges seriatim, he alleges, first, that the PAHO has not discharged the burden of proof it bears in disciplinary cases. His supervisor's order being ultra vires, there was no question of insubordination, and he chose to pursue his lawful business discreetly. As to the allegation of a conflict of interests, he neither made the office an exchange agency nor impaired the PAHO's integrity; he committed a single "mistake" in thirty years of cashing cheques, and it did not amount to an attempt to defraud. Since the PAHO lets officials use the pouch for business with the Credit Union in Washington, he did not abuse the pouch service.

His second plea is breach of the principle of proportionality. Even if his conduct was improper it did not warrant summary dismissal, which is a fitting penalty only for conduct incompatible with the performance of duty. His own performance was satisfactory.

He claims reinstatement, moral damages and costs. He also wants the Organization to produce the audit report of December 1991, which the Board of Appeal cites.

C. In its reply the PAHO contends that dismissal was lawful and warranted. Not only has it discharged the burden of proof but the complainant admits to carrying on business after his supervisor had ordered him to stop. If he regarded the order as ultra vires he should have lodged an appeal, not disobeyed it. By continuing to use for his own advantage information gained through his official position he infringed Regulation 1.6 and such conflict of interest amounts to misconduct under Rule 110.8.3. Since his insubordination, deceit and failure to anticipate the conflict of interests were incompatible with his duties dismissal was the only "responsible" decision open to the Director.

The PAHO produces the audit report.

D. In his rejoinder the complainant challenges the PAHO's account of the facts and accuses it of muddling "emotional" and legal arguments. He observes that it is relying on provisions of the Staff Regulations and Rules which it failed to cite in its decisions to suspend and dismiss him, and of which he committed no breach anyway. He therefore presses his claims.

E. In its surrejoinder the PAHO seeks to refute the complainant's arguments in his rejoinder and presses its earlier pleas.

CONSIDERATIONS:

1. The PAHO employed the complainant from 1962 until 10 May 1993, when it dismissed him, as an "administrative assistant II" in the office of the Representative of that Organization and of the World Health Organization at Bogota, in Colombia. Subject to supervision by the Representative he was in charge of the disbursement and control of funds allocated to the office and his functions included the signing and issuing of cheques on the PAHO's behalf.

2. Some time in mid-1992 consultants told the Representative that the complainant was turning the office into a currency exchange agency. The Representative thereupon

summoned him and ordered him to stop such business. The complainant promised that he would. He nevertheless carried on as before in the belief that it was "simpler to be discreet" until the Representative himself had gone and then "return to business as usual".

3. On 17 February 1993 the Representative reported to the Chief of Administration at PAHO headquarters in Washington, D.C. that the complainant was in breach of his promise to stop his currency exchange business. By a letter of 19 March 1993 the Chief of Personnel informed him that he was suspended from duty under Staff Rule 1120 on the grounds of "unethical activities". They consisted in "cashing and converting cheques issued by the Organization" which he "later negotiated and endorsed" as "holder". In a reply of 25 March to the Chief of Personnel he protested that the transactions were lawful. He attached texts of Colombian legislation; a statement of his account with the Credit Union of the PAHO and the WHO, of which he was a member, for the period from 1 October to 31 December 1992; a list of PAHO staff who had made deposits in that account for the purpose of his making payments to their relatives in Colombia; and statements from two banks in Colombia giving details of his transactions with them.

4. In a letter of 15 April 1993 the Chief of Personnel charged him with "serious misconduct" under three heads:

> "insubordination in the face of express instructions" from his supervisor;
>
> "conflict of interests"; and
>
> "abuse of the Organization's pouch privilege"

and invited him to answer the charges within eight days. In his reply of 21 April to the Chief of Personnel he stated that:

1. He had been guilty of no act of insubordination.
2. There was no conflict of interest. Once a cheque was issued it became the property of the beneficiary, who could deal with it as he pleased. There was no legal prohibition to prevent the complainant from buying foreign currency.
3. Staff were entitled to use the diplomatic pouch to send correspondence to the Credit Union.

By a letter of 5 May the Chief of Personnel informed him that the Organization rejected his explanations and he was dismissed at 10 May in accordance with Staff Rule 1075.2.

5. He thereupon applied to the headquarters Board of Appeal. In its report of 30 September 1994 the Board held that the charges against him were proven but recommended, among other things, that instead of dismissal he should be reinstated at a lower grade and paid costs. By a letter of 16 November 1994, however, the Director of the PAHO informed him that since the Board's recommendations could not be "reconciled with their substantive conclusions" as to his guilt his appeal was dismissed. That is the decision he is impugning.

Insubordination

6. The complainant contends that the Representative had no right to forbid him to carry on his currency exchange activities. He argues that provided that he was not neglecting his duties the Staff Rules did not prohibit such activities and that the Representative's order was therefore ultra vires.

7. It is clear from the Staff Regulations that the Representative was accountable to the Director of the Organization for the work of the Bogota office and had authority to direct and supervise the complainant's performance of his duties. The Representative's authority necessarily covered the giving of instructions to stop any activity which in his view was in breach of the Staff Regulations and Staff Rules or contrary to the Organization's interests. In Judgment 1277 (in re Avralioglu) the Tribunal upheld the contention that where a staff member wished to challenge an administrative decision the means whereby he did so must be lawful, for example recourse to the appeals procedure: he was not free to take the law into his own hands. Likewise, if the complainant felt that the Representative's order was ultra vires the proper course was for him, not just to carry on regardless, but to raise the issue with the Representative and, if necessary, refer it through the Representative to headquarters for a ruling. By failing to obey an explicit and unambiguous order from his supervisor he was in breach of his duty under the Staff Regulations, which declare staff to be subject to the authority of the Director. In this instance that authority had been delegated to the Representative.

Conflict of interest

8. It is not in dispute that he was carrying on the business of exchanging money for people associated with the PAHO. He made no secret of it; indeed he said he had been doing it for 25 years. It appears on the evidence that he was able to get revolving credits from two banks in Bogota which made available to him loans amounting to 10,000 United States

dollars a month. With such credit he would buy Colombian currency at the special rates which he obtained only because he was an international civil servant. He would then cash at the rates prevailing on the exchange market the cheques of people associated with the PAHO who were paid in dollars and so repay the loans secured by means of the revolving credits together with the sums due in interest. His profits, which he estimated at 2.5 per cent on each transaction, consisted of the difference between the special rate and the market rate less the interest he had to pay to finance the purchase of Colombian currency. The cheques which he cashed and endorsed were deposited in his account with the Credit Union in Washington. Another side of the business was that he would receive payments into that account from people in Washington and make payments in Colombia to their nominees.

9. His Credit Union account for the period from 1 October to 31 December 1992 shows 19 deposits made at fourteen dates and totalling $50,684.96. The bank accounts in Bogota show a regular pattern of debits and credits and the purchase of Colombian currency, at various rates of exchange, for $52,949.06. All those transactions reveal extensive and complex business dealings.

10. The Organization cites Article I of the Staff Regulations: staff members must regulate their conduct with the interests of the Organization solely in view (Regulation 1.1); place their whole time at the disposal of the Organization (1.2); and refrain from engaging in any occupation incompatible with the proper discharge of their duties (1.4). In the defendant's submission the complainant's business dealings were in breach of those obligations because they conflicted with his fiduciary responsibilities and constituted abuse of his position for private gain.

11. His answer is that those provisions of the Staff Regulations are about the loyalty of staff members and unrelated to any outside economic activity which they may pursue, which is forbidden only when incompatible with the proper discharge of their duties.

12. As to the propriety of outside economic activity, the defendant's surrejoinder cites the 1982 edition of a Report on Standards of Conduct in the International Civil Service by the International Civil Service Advisory Board. That report contains the following passages:

> "50. ... the primary obligation of an international civil servant is to devote his energies and capacity fully to the work of the organization he serves. ... There can be

> no participation in activities which cause an excessive drain on the staff member's time and energy ...
>
> 51. ... The conditions of employment of international organizations are designed to make it possible for the staff member to devote himself to his career, and outside activities the principal aim of which is to procure financial gain would be inadmissible."

13. The Tribunal accepts the statement of those principles as being in accordance with the purposes that the Staff Regulations seek to attain. The many sides of the complainant's business required of him so much time and effort that in pursuing it he was in breach of his obligation to devote his energies fully to the Organization's service.

The use of the diplomatic pouch

14. According to Section 12 of Article IV of the Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations, the Organization has the right to despatch and receive material by diplomatic pouch. The use of the pouch is restricted by WHO Manual paragraph V.1.855 to official correspondence, authorised documents and publications, supplies and equipment intended for official use when despatch by pouch is considered necessary.

15. The Organization states that it allowed its staff to use the pouch, among other purposes, to forward necessary and normal correspondence to its Credit Union. Though it does not disclose the exact terms of such permission, the concession it grants presumably covers only correspondence of the kind that would ordinarily be required for the making of personal deposits and withdrawals of funds; it does not extend to transactions carried out in the conduct of a business.

Proportionality

16. The complainant was dismissed for serious misconduct under Staff Rule 1075.2. Rule 110.8 defines misconduct to include:

> "110.8.2 any conduct by a staff member, unconnected with his official duties, tending to bring the Bureau into public discredit;
>
> 110.8.3 any improper use or attempt to make use of his position as a staff member for his personal advantage;
>
> ..."

17. The charges against the complainant of insubordination, conduct incompatible with his status as an international civil servant and misuse of the pouch service are fully proven. The only remaining issue is whether the sanction of dismissal is out of proportion to the objective and subjective circumstances of his case.

18. There is no evidence to bear out the conclusion of the headquarters Board of Appeal that there were mitigating circumstances. On learning that the complainant was conducting a currency exchange business at the office, the Representative ordered him to stop immediately. In the circumstances it is immaterial that there was neither mention of the matter in the reports on his performance nor a written reprimand. Nor does the audit report of December 1991, to which the Board of Appeal referred in its report, support the finding that the Administration had already been warned of his activities. The Tribunal concludes that in the circumstances of the case the sanction of dismissal was warranted.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

Wm Douglas
William Douglas

Mella Carroll
Mella Carroll

Mark Fernando

A.B. Gardner
A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FIRST SESSION

In re LANGELEZ (No. 4) Judgment 1551

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr. Jean-Claude Langelez against the European Organization for Nuclear Research (CERN) on 26 June 1994 and corrected on 15 July 1995, CERN's reply of 23 October 1995, the complainant's rejoinder of 29 January 1996 and the Organization's surrejoinder of 19 April 1996;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to the present case are set out under A in Judgments 1104 and 1172 on Mr. Langelez's first and second complaints. In Judgment 1172 the Tribunal dismissed his second one challenging the decision, taken on 15 January 1991 by the Director of Administration on the Director-General's behalf, to endorse the recommendations of the Joint Advisory Rehabilitation and Disability Board not to regard his ailments as service-incurred and to reassign him to a post for a mechanic.

In a letter of 10 May 1993 the complainant alleged that the decision of 3 March 1993 to put him on career path III was "directly linked" to the decision taken in 1991 to reassign him; that reassignment had been linked to the decision taken in 1988, after the reorganization of shift work in 1984-85, that he was unfit for such work; and so he wanted the quashing of the decisions of 1988, 1991 and 1993 and compensation for the injury he had suffered.

The Director of Administration replied on 9 July 1993 that the decision of 3 March 1993 was linked neither to the complainant's reassignment nor to the finding that he was unfit for shift work.

In a letter of 8 September 1993 the complainant pressed his claims of 10 May and asked the Director-General to tell the Joint Advisory Appeals Board that he was appealing against "the decision of 9 July 1993 ... and particularly the implied rejection therein of the claim to compensation".

The Director of Administration replied in a letter of 15 November 1993 that the claim to damages was irreceivable because it was vague and gave no figures and because there was no link between the decision he was challenging and others against which his internal appeals had failed.

On 14 January 1994 he renewed his appeals of 10 May and 8 September 1993.

By a letter of 15 March 1994, the decision he impugns, the Director of Administration referred him to the earlier replies.

By a letter of 8 June 1994 the Director informed him on the Director-General's behalf that he would be dismissed at 30 September 1994 on the grounds of serious shortcomings in the performance of his duties.

B. The complainant refers to a decision of 10 April 1985 about shift work which he says was in breach of Regulation R III 1.19. He alleges that when he objected the Organization used his poor health as an excuse to take him off shift work.

He argues from precedent that his complaint is receivable.

He asks the Tribunal to quash all the decisions concerning him that the administration has taken since 3 October 1988; to award him compensation for the injury caused by the decisions of 9 July 1993, 15 November 1993 and 15 March 1994; to rule that there was unlawful action on the part either of the SL (SPS) Division if it acted without authority, or of the Director-General if he delegated authority to the Division; to order CERN to grant him the protection and compensation for injury due to staff in the exercise of their duties under Rule I 3.07; to order an assessment by an outside expert; and to award him costs.

C. CERN replies that the complaint is irreceivable: the letter of 15 March 1994 which the complainant is challenging is not a decision since it merely refers to earlier letters from the Organization informing him that his appeals and claims for compensation were irreceivable. His appeal against the implied rejection of his claim of 10 May 1993 to damages was out of time. In any event the claims in his complaint are too vague to be receivable: he states neither the nature and cause of the injury nor the amount he seeks in damages.

Besides, his claim to compensation is irreceivable since it is out of time. The injury he alleges was a result of the 1984-85 reforms; so, to be receivable, his claim should have been made in an appeal filed in time against the decisions which he says are unlawful. The precedents he cites do hold that a complaint will be receivable against a decision that still affects the staff member. But they are immaterial because the complainant stopped shift work in 1988. And even though a staff member may impugn an individual decision in pleading the unlawfulness of the rule to which that decision gives effect, he must do so in time. The complainant did not.

CERN's pleas on the merits are subsidiary. It submits that there was no breach of the rules on shift work. The expert opinion of 1990 found that the illness the complainant suffered from in 1988 was not service-incurred. So there is no causal link between the illness and its alleged cause, namely the shift system introduced in 1984-85.

D. In his rejoinder the complainant maintains that the reform of the shift system was unlawful and was the cause of his illness and that the complaint is receivable. He cites administrative circular 14 which says that claims can be submitted for up to ten years after the appearance of the first symptoms of illness. As regards the medical examination he had to undergo in 1990, he wants to know whether CERN did its utmost to ensure that it was proper and in particular that the expert was fully informed. He claims not less than 2 million Swiss francs in damages.

E. In its surrejoinder the Organization presses its pleas. It points out that the complainant's pleas about a breach in 1984-85 of the rules on shift work and about the preparations for the expert medical examination were submitted in complaints that the Tribunal has already dismissed. So he may no longer challenge the decisions he alleges to be unlawful.

CONSIDERATIONS:

1. Facts relevant to this dispute are set out under A in Judgments 1104 and 1172 on Mr. Langelez's first and second complaints. In this complaint he purports to be challenging a final decision of CERN's dated 15 March 1994. His claims are set out under B above.

2. In an internal appeal of 10 May 1993 to the Director-General he submitted that a decision of 3 March 1993 to put him

on career path III was directly linked to one of 15 January 1991 reassigning him to a post of mechanic and that it in turn was linked to one of 3 October 1988 declaring him unfit for shift work. Relying on the connection between those decisions, all of which he saw as "unlawful", he wanted them to be reversed and claimed damages. On 9 July 1993 CERN rejected his appeal. Believing that it had failed to answer his claims, he repeated them in a letter of 8 September 1993, asking the Organization to put his case to the Joint Advisory Appeals Board. On 15 November 1993 the Director of Administration told him that his request was irreceivable. In a letter of 14 January 1994 to the Director-General the complainant said he was pressing his appeal and all his pleas in support of it. In a letter of 15 March 1994 CERN referred him to its earlier replies.

3. The Organization contends that the complaint is irreceivable because it was not filed within the ninety-day time limit in Article VII(2) of the Tribunal's Statute.

4. In his letter of 15 November 1993 the Director of Administration rejected his appeal in the following terms:

> "... since the decision you are objecting to has no connection in law with the others you mention and you have unsuccessfully exhausted all your remedies, your claim to 'compensation for injury', which is vague and on which you put no figure, is irreceivable."

The passage leaves no doubt but that the Director was notifying final rejection of the appeal. So the date of the final decision is indeed 15 November 1993. The letter of 15 March 1994 contained no decision but merely referred the complainant to earlier correspondence.

5. The decision of 15 November 1993 was notified to the complainant the next day. So the time limit of ninety days in Article VII(2) of the Tribunal's Statute for filing a complaint began on 16 November 1993. Since he did not file until 26 June 1994 his complaint is, as the Organization says, irreceivable.

6. In his internal appeal of 10 May 1993 he argued that a set of decisions CERN took from 3 October 1988 to 3 March 1993 had caused him harm. But in his complaint to the Tribunal he blames the injury he has suffered on decisions of 9 July 1993, 15 November 1993 and 15 March 1994. Having made one set of claims in his internal appeal and another before the Tribunal, he failed to observe the requirements in Article VII(1) on exhaustion of the internal remedies. On that score too his claims are irreceivable.

7. Secondly, he says in his brief that the offending decisions were taken in the course of the internal appeal proceedings. That statement makes no sense. The decisions

which he blames for the injury came after 10 May 1993, the date at which he filed the appeal. So at the date of filing no injury could yet have occurred.

8. Lastly, a claim to damages cannot succeed unless the claimant proves the unlawful act and the consequent injury. Since the complainant has not done so, his claim to damages must fail.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. Michel Gentot, Vice-President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

(Signed)

Michel Gentot Julio Barberis Egli

A.B. Gardner

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FIRST SESSION

In re LANGELEZ (No. 5) Judgment 1552

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Mr. Jean-Claude Langelez against the European Organization for Nuclear Research (CERN) on 26 June 1994 and corrected on 15 July 1995, CERN's reply of 23 October 1995, the complainant's rejoinder of 29 January 1996 and the Organization's surrejoinder of 19 April 1996;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Some of the material facts of this case are set out under A in Judgment 1551, also delivered this day, on Mr. Langelez's fourth complaint.

At the end of lengthy correspondence and by a letter of 22 March 1994, the impugned decision, the Organization yet again confirmed that all the complainant's appeals were irreceivable "for the reasons given in earlier letters".

B. The complainant restates the pleas which he put forward in his fourth complaint and which are summed up under B in the above-mentioned Judgment.

He asks the Tribunal to quash all the decisions that CERN has taken on his case since 3 October 1988, award him damages for the decisions of 26 July 1993, 23 November 1993 and 22 March 1994; to declare either that the SL (SPS) Division acted ultra vires or else the Director-General acted unlawfully by vesting authority in it; to order the Organization to afford him the protection and compensation due to staff under Rule I 3.07 in the performance of their duties; to order an independent medical inquiry; and to award him costs.

C. CERN replies that the complaint is irreceivable. The letter of 22 March 1994 is not a decision since it merely refers to earlier letters from the Organization informing him that his appeals and claims to redress were irreceivable. In any case the claims in the complaint are too vague to be receivable: he states neither the nature and cause of the injury nor the amount he seeks in damages.

In subsidiary argument it contends that the complaint is devoid of merit.

D. In his reply the complainant restates the pleas he put forward in his fourth complaint which are summed up under D, in the above-mentioned judgment.

E. In its surrejoinder the Organization presses its pleas. It submits that the impugned decisions are final and beyond challenge.

CONSIDERATIONS:

1. In this complaint Mr. Langelez is challenging a decision of 22 March 1994 and making the claims set out in B above. In an internal appeal of 10 June 1992 he asked the Director-General to reopen the case so that the Organization might adduce evidence in support of a decision it had taken on 3 October 1988 that he was unfit for shift work. CERN told him on 19 June 1992 that even if his letter of 10 June might be treated as an appeal it was time-barred and therefore irreceivable. That reply prompted from him another appeal dated 20 August 1992. On 19 October the Organization confirmed that his claims were irreceivable.

2. On 20 August 1992, the very day on which he lodged his appeal, he sent CERN a letter alleging that a "new fact" entitled him to appeal against the decision of 3 October 1988 and against another of 15 January 1991 about his reclassification. On 20 October 1992 CERN informed him that the alleged "new fact" afforded no grounds for appeal against the decisions taken in 1988 and 1991.

3. By a letter of 19 December 1992 the complainant told the Director-General that he was renewing the "appeals he had

already lodged in the letter of 10 June 1992 and in two others of 20 August 1992, all about earlier appeals" and wanted referral to the Joint Advisory Appeals Board. By a letter of 5 February 1993 the Director of Administration answered him on the Director-General's behalf that under Staff Rule VI 1.01 appeal lay against a specific decision by the Director-General and that he was too late to challenge the decisions of 3 October 1988 and 15 January 1991.

4. On 9 April 1993 the complainant filed what he called "a new appeal against the latest unfavourable decision of 5 February 1993" and maintained his "earlier appeals". He asked CERN to determine the date of "consolidation" of his illness in accordance with paragraph 11 of administrative circular 14. By a letter of 4 May 1993 the Director-General said that he confirmed that the appeals were irreceivable; that since 10 June 1992 the Organization had shown not the slightest inclination to reverse the final decisions of 3 October 1988 and 15 January 1991; that the final decisions in his letters had settled those issues once and for all; and that in the ensuing correspondence there was no final decision against which appeal might lie under Staff Rule VI 1.01.

5. On 3 July 1993 the complainant again asked to have the date of "consolidation" of his illness determined; claimed damages for CERN's refusal to set that date; and pressed every single appeal he had lodged since 10 June 1992. The Organization's answer of 26 July 1993 was that setting a date of "consolidation" was utterly irrelevant to his case and that his claim was out of time anyway because he was challenging a decision that dated back to 15 January 1991. In answer to a further appeal that he had lodged on 23 September 1993 the Director of Administration told him in a letter of 23 November 1993 that his claim to damages and every one of his appeals were irreceivable.

6. The wording of that letter of 23 November 1993 is plain: it conveyed no new decision but merely referred to earlier replies. It reads:

> "In answer to your letter of 23 September 1993 ... the Director-General has instructed me to tell you that he has nothing to add to the letters you were sent on [4] May and 26 July 1993."

7. By a letter of 21 January 1994 the complainant appealed against the letter of 23 November 1993. The Director of Administration answered yet again, on 22 March 1994, as follows:

> "The appeals you have lodged or revived [in your letter of 21 January 1994] are irreceivable for the reasons given in my earlier letters to you ..."

8. Under point 3 (a) (i) of the complaint form the complainant gives 22 March 1994 as the date of the final decision he is impugning. As is plain from the foregoing, the letter bearing that date is not a challengeable final decision. Indeed, merely referring as it does to earlier correspondence it does not amount to a decision at all.

9. Article VII(2) of the Statute sets a time limit of ninety days for filing a complaint from the date of notification of the challenged decision. The complainant filed this complaint on 26 June 1994. It is therefore out of time and irreceivable insofar as it challenges any decision notified to him before 28 March 1994. Since the decisions he purports to challenge were all notified to him before that date they are no longer appealable before the Tribunal.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. Michel Gentot, Vice-President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

(Signed)

Michel Gentot Julio Barberis Egli

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL | INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF | *ADMINISTRATIVE TRIBUNAL*

EIGHTY-FIRST SESSION

In re MORENO DE GOMEZ

Judgment 1553

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Yocasta Moreno de Gómez against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 14 October 1994 and corrected on 20 December 1994, UNESCO's reply of 3 March 1995, the complainant's rejoinder of 8 January 1996 and the Organization's surrejoinder of 12 March 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Colombian citizen who was born in 1944, started work at UNESCO in 1976 under a one-month contract as a trainee in the Education Sector at its headquarters in Paris. She continued under similar contracts for short periods.

On 1 December 1980 UNESCO offered her a temporary three-month appointment as Spanish language editor at grade P.3 in the Publications Unit of the Sector and extended it until 31 October 1981. On 1 November 1981 it granted her a fixed-term appointment and extended it regularly until 30 June [illegible]3, when her last contract was to expire. By a letter of 12 February 1991 the Director-General informed her that as from 1 July 1987 her post was one of principal editor and upgraded to P.4, and that she was to be promoted to that grade as from 1 January 1988.

On 30 March 1992 the head of the Publications Unit gave her oral notice of the abolition of her post. By a memorandum dated 11 May the acting Director of the Bureau of Personnel confirmed that her post had been abolished in "the 1992/93 Staffing Table Review".

In June 1992 the Director-General set up a Senior Personnel Advisory Board (SPAB) to see about placing redundant staff. On 30 June the Board recommended appointing the complainant to any one of three posts it thought would do, including one - No. ED-634 - for a programme specialist. That post having been put up for competition, a second SPAB met on 20 July to assess the candidates. It recommended appointing the complainant but the Director-General preferred an outside candidate.

By a memorandum of 24 September the Bureau of Personnel informed her that, having found no other assignment for her, it was asking the Director-General to terminate her appointment. A third SPAB met on 29 September to consider that proposal. In a report it submitted the following month it recommended that the Inspectorate General should review the duties of Spanish language editor at UNESCO. It also recommended postponing the abolition of her post or, failing that, putting her on a temporary one.

In a memorandum of 29 December 1992 the acting Director of Personnel informed her that her post was going to be abolished on 1 January 1993 and that her appointment would end on 31 January 1993 under Staff Regulation 9.1 on grounds of "necessities of the service"; until then she would be on a temporary post.

By a memorandum of 28 January 1993 she lodged a protest with the Director-General against that decision. Having got no reply, she put her case to the Appeals Board on 16 March 1993. In its report of 16 June 1994 the Board recommended reinstating her. In a letter of 25 July the Director-General told her that he had ordered further attempts to place her. That is the first decision she impugns. By a letter of 10 November 1994, which she is also challenging, the Director of the Director-General's office told her that the Bureau of Personnel had found no other assignment for her.

B. The complainant submits that the purpose of abolishing her post was to get rid of her for want of any proper grievance against her. The reference in UNESCO's decision of 29 December 1992 to Regulation 9.1 is too vague. The reasons the Organization offered in correspondence and to the Appeals Board were (1) a scant workload, (2) restructuring of the Education Sector, (3) cost-cutting and (4) the policy of decentralisation of editing in Spanish. Those reasons are, she says, wrong and partly inconsistent.

She points out that the refusal to reinstate her ignored the recommendations of 30 June and 20 July 1992 by the senior personnel advisory boards. The process of redeployment was tainted with misappraisal of the facts and diverted from its proper purpose. UNESCO was wrong to refuse her reassignment on the grounds that she was unqualified. She had training in the science and technology of education and had shown her versatility in other areas too. Her reports from 1980 to 1991 were all good. The process was misapplied in that the supposedly vacant posts of which the Bureau of Personnel had given the advisory boards a list were not free, or else the Education Sector saw that they were not.

Lastly, abolition and termination were both due to the hostility of a senior officer with whom she had disagreed at work in 1984.

She seeks the quashing of the decision of 29 December 1992, reinstatement as from 1 February 1993 in a post at grade P.4 and in life insurance coverage, cancellation of interest on overdue debts to UNESCO's savings and loans service, awards of material and moral damages and costs.

C. In its reply UNESCO contends that the abolition of the complainant's post was the outcome of an overhaul of the Education Sector required by scarcity of funds. Citing Judgment 351 (in re Pibouleau), it pleads that the Tribunal may neither assess policy set by its governing bodies nor review decisions that give effect thereto. The abolition of the post was due to "necessities of the service" and a proper exercise of the Director-General's discretion.

UNESCO says it did its utmost to place her as the senior personnel advisory boards and the Appeals Board had recommended. Her own sector and others considered appointing her to the posts the competent board had suggested or to others. But none of them matched her background and qualifications. In the competition to fill post ED-634 she was not even put on the short list.

In answer to the charge of misuse of authority, UNESCO says that the evidence does not bear out her charge of hostility. She fails in particular to show that the senior officer she mentions acted to her detriment.

D. The complainant rejoins that in discarding the recommendations by the three senior personnel advisory boards the Director-General ignored her qualifications and drew mistaken conclusions from the evidence. The preference he gave an outside candidate for post ED-634 was in breach of Regulation 4.4, which grants priority to serving staff for appointment to vacant posts, which reads:

> "Subject to the provisions of Regulations 4.2, 4.3, 4.3.1 and 4.3.2 and without prejudice to the recruitment, at all levels, of fresh talent, staff members (and former staff

> members with at least one year's service, separated during the previous two years owing to the abolition of posts) shall be given priority of consideration for vacant posts. Next priority shall be given, subject to reciprocity, to applicants already in the service of the United Nations and other Specialized Agencies."

E. In its surrejoinder the Organization restates its pleas. In its submission the case law recognises the Director-General's broad discretion to assess candidates for a vacancy. Besides, the complainant had no right to priority over an outside candidate. In any event she failed to appeal in time against the appointment of someone else to ED-634.

CONSIDERATIONS:

1. After serving the Organization under short-term contracts from 1976 until 1981 the complainant was granted a fixed-term appointment as from 1 November 1981 on a post, No. ED-598, for a Spanish editor in the Publications Unit of the Education Sector. Her grade was P.3. Her post became that of senior editor in Spanish and was upgraded to P.4, and she was promoted accordingly, as from 1 July 1987. Her fixed-term appointment was extended several times. The last extension was to expire at 30 June 1993.

2. On 30 March 1992 the head of the Publications Unit told her orally that her post was to be abolished. On 22 April 1992 she wrote to the Director-General pointing out that her post was "intersectoral" in that though it belonged to the Education Sector she edited texts for units in other sectors. She cited resolutions in which the General Conference of UNESCO had declared Spanish to be the language of over a score of member States and their peoples; she asked the Director-General to reverse the decision on the grounds that it might conflict with the Organization's interests; and she suggested that there would anyway be no difficulty over transferring her because she was qualified in the science and technology of education.

3. The complainant's qualifications and competence are not in dispute. She has, among other educational attainments, a diploma and a degree from institutions in Colombia, training in the application of audio-visual techniques to education and in educational television, and a degree of master of educational sciences from the University of Paris VIII. In the reports on her performance her supervisors commended her for

carrying out heavy responsibilities efficiently and conscientiously and with professionalism.

4. The Organization's "staffing table" for 1992-93 provided for the abolition of her post, ED-598, and for her redeployment. Rule 104.1(b) reads:

> "(b) The Personnel Advisory Boards, each for the category of staff with which it is concerned and except with regard to the cases specified in paragraph (c) below, shall give advice on the following matters:
>
> ...
>
> (xii) such other cases as the Director-General may request."

The Director-General accordingly consulted a Senior Personnel Advisory Board (SPAB). The Board was to see whether redundant officials qualified for any of the posts vacant, of which it was given descriptions. It recommended considering the complainant for three posts, which were numbered ED-634, CII-133 and CEU-249. Post ED-634 was in the Education Sector and applications for it were invited from 22 January to 22 April 1992. In a letter of 22 April to the Director-General the complainant said that she thought she was qualified for it.

5. The question of recruitment to post ED-634 was referred to a SPAB, which recommended the complainant, and her alone, for the post.

6. In a memorandum dated 24 September 1992 the Bureau of Personnel told her that since it had found no suitable post for her the Director-General would be convening another SPAB to consider the question of termination of her appointment.

7. In a report dated 21 October 1992 the new SPAB observed that though recommended for three posts she had not been interviewed for any of them. It recommended "in-depth study" of the duties of a Spanish editor and either postponing abolition of post ED-598 or else putting her on a temporary one to allow time in which to see whether she could be transferred to any of the nine posts that she herself thought would suit her.

8. Having seen the Board's report, by a memorandum of 29 December 1992, the acting Director of Personnel informed her on the Director-General's behalf that her appointment was terminated at 31 January 1993. On 28 January she appealed to the Appeals Board.

9. In its report of 16 June 1994 the Appeals Board observed that of the twelve posts that were being abolished in the Education Sector six were at the time vacant and there were officials on the other six. Of those six officials three were to retire. One of the remaining three had agreed to termination and another was being redeployed. The complainant was the only one to have to go. The Board held that in filling post ED-634 there had been disregard of her academic qualifications, her experience of education, her very good record of performance, and the priority she had deserved on account of the abolition of her post. It believed that, having a consistently good record over ten years, she should have proved suitable for redeployment. It recommended reappointing her as from the date of termination, on a temporary post if necessary, until a suitable established one was found.

10. Paragraph 20 of the Statutes of the Appeals Board required the Director-General to take a decision on the Board's report "as soon as possible". By a letter of 25 July 1994 he told her that after considering the report and the records of her case he was ordering further attempts to find a suitable post for her.

11. On 5 August 1994 the Bureau of Personnel circulated a memorandum to sixteen units telling them of the Director-General's instructions and supplying information about the complainant's qualifications and experience.

12. On 10 November 1994 the Director of the Director-General's Office informed the complainant that despite many inquiries and consultations the Bureau had been unable to find a post for her, but the Director-General was willing to treat the termination of her appointment as agreed separation under Regulation 9.1.2 and Rule 109.7(e) and in accordance with the Rule to raise her indemnity by half.

13. The complainant is impugning the Director-General's decision of 25 July 1994 and the final decision conveyed in the Director's letter of 10 November 1994. Her pleas are that the termination was flawed by a mistake of law, mistakes of fact and the failure to consider essential facts, misappraisal of the evidence, breach of due process, bias and abuse of authority.

The abolition of the complainant's post

14. The complainant argues that the abolition of her post, ED-598, was a subterfuge calculated to get rid of her for want of any legitimate grievance. In her submission the decision was irrational in that not enough consideration was

given to the importance of publications in Spanish. Since the post was "intersectoral" the workload did not depend merely on the needs of the Education Sector. Yet that sector recommended doing away with the only post of Spanish editor in the whole secretariat and at the same time creating two posts for English editors. She contends that the reasons given for the restructuring - the need to reduce costs and the "decentralisation" of editorial services - were unsound. She asks the Tribunal to declare the abolition of her post an abuse of authority.

15. Many judgments - for example 1131 (in re Louis) - have declared that the Tribunal will not review an organisation's policy but only an individual decision taken to give effect thereto and the actual application of substantive rules. Its power of review is limited. It may not supplant an organisation's view with its own on such matters as policies of restructuring or redeployment of staff intended to make savings or improve efficiency. It will interfere only when a decision was taken without authority or in breach of a formal or procedural rule, or was based on a mistake of fact or of law, or neglected some essential fact, or constituted an abuse of authority, or drew mistaken conclusions from the factual evidence.

16. In a memorandum of 31 July 1992 to senior officers both at headquarters and in field offices the Director-General stated that in accordance with the Programme and Budget approved by the Organization's General Conference at its twenty-sixth session he was making several changes in the Education Sector. He cited the plans of work and staffing tables for 1992-93 and the consequent recommendation to abolish post ED-598 and reassign the complainant. The Tribunal is satisfied that the restructuring of the Education Sector, entailing the abolition of post ED-598, was not aimed at the complainant herself: there were objective goals that the Organization was seeking to attain and the Tribunal will not review the reasons of policy underlying the decision to restructure the Sector.

The charge of bias

17. The complainant alleges that the bias which the Administration has shown towards her goes back to 1984, when she co-operated in an inquiry carried out by the Inspectorate General. One finding of the inquiry - she says - "nearly created difficulties" for the head of the division in which she was working. That official was later promoted to high office in the Organization and she alleges that countless disguised sanctions were imposed on her after the inquiry.

18. In the absence of direct evidence she is asking the Tribunal to infer some connection between the inquiry and later incidents and impute some ulterior and malicious motive to those who took decisions which affected her. The incidents are too remote, however, and the evidence she offers too tenuous for the Tribunal to be satisfied that her charge of bias against the Administration is sound.

The failure to reassign

19. The complainant contends that, as the Appeals Board held, there was a general misconception in the Organization of her qualifications and specialised training though her appraisal reports had commented on her versatility and ability to work on her own in clarifying specialised publications.

20. It seems indeed strange that as late as 6 November 1992 the complainant had to write to inform the Assistant Director-General in charge of the Education Sector of her qualifications and experience in education. In a memorandum of 18 September 1992 to the Director-General the Deputy Director-General for Management reported on meetings he had held with staff representatives about redeployment and termination and sought the Director-General's confirmation of the decisions he set out. In an appendix to his memorandum the complainant's duties were described as "editing manuscripts" and "translation"; the date of her recruitment was wrong; and she was said to have been born in 1937, not in 1944. Yet the nature of her qualifications, the duties assigned to her former post and her age were all crucial considerations in deciding whether, and to what posts, she could be reassigned.

21. The complainant contends that in selecting an external candidate for post ED-634 the Director-General acted in breach of Regulation 4.4, which entitled her to priority for assignment to a vacant post, and thereby denied her the benefit of the Regulation, the text of which appears in D above.

22. The Appeals Board stated:

> "... the duty of the Administration for the reintegration of an employee is paramount. That is why Regulation 4.4 states that 'staff members shall be given priority of consideration for vacant posts'. After carefully looking at all the documents and the facts and circumstances of the case, the Appeals Board is of the opinion that the Administration has not pointed out how it tried to fulfill this duty."

There is indeed conflicting evidence about some of the efforts the Organization made to redeploy the complainant. In a letter dated 29 January 1993 the Director-General informed the president of the Staff Association that the Education Sector had considered her for nine posts and had turned her down for every single one. Yet in a memorandum of 4 November 1992 to the Chief of Human Resources Development, Bureau of Personnel, the Sector had stated that of the nine posts one had been abolished; two, including ED-634, were filled; one was not available because the occupant had been transferred elsewhere with it; two were frozen until 1 January 1994; one was to be abolished on the retirement of the incumbent; one was highly technical and the complainant's fitness for it had to be assessed; and an assessment of her fitness for post ED-924 which was graded P.3 had been sent to the Deputy Director-General for Management.

23. The only answer the Organization offers to the complainant's plea about Regulation 4.4 is in its surrejoinder:

> "The complainant is plainly mistaken in thinking that she has any right of priority over an outside candidate whatever their merits may be."

The Organization has in fact fallen into error in construing 4.4. The true scope of the protection it affords is to be explained in Judgment 133 (in re Hermann) on another case that was brought against UNESCO:

> "... as a general rule, the procedure laid down by Articles 4.1 to 4.4 of the Staff Regulations and by Staff Rules 104.1 and 104.2 will be followed; in other words, after consulting the competent Advisory Board and comparing the merits of the various candidates, the Director-General will assign the staff member whose post has been abolished to another post only if he appears to be at least as competent as the other applicants in competition with him. However, it is consonant with the spirit of the rules and regulations that a staff member who has served the Organization in a fully satisfactory manner for a particularly long period, and who might reasonably have expected to finish his career in the same Organization, should be treated in a manner more appropriate to his situation. If he loses his post, he may claim to be appointed to any vacant post which he is capable of filling in a competent manner, whatever may be the qualifications of the other candidates. Not only does this interpretation of the relevant rules take account of the legitimate expectations of staff members, but it is not prejudicial to the Organization itself, which has every interest in employing staff members who have shown themselves deserving of confidence over a long period of employment."

24. The Tribunal is satisfied on the evidence that despite the unanimous recommendations by the senior personnel advisory boards and by the Appeals Board the Organization failed to give the complainant priority for vacant posts. It put the wrong question to its units and to its Bureau of Personnel. The right question was not whether there was a post that fitted her qualifications and experience but whether there was a post of which she was capable of fulfilling the duties competently. Even after the Director-General had written her the letter of 25 July 1994 mentioned in 10 above no instructions went out that she should be given priority for any vacant posts. So the decision to terminate her services rested on a misinterpretation of Regulation 4.4 and and so on a mistake of law. That decision must therefore be set aside, there being no need to entertain the complainant's other pleas.

25. The termination has had disastrous results for the complainant and her family. Because of loss of income she had put up her flat in Paris for sale by public auction and it fetched a fraction of its market value. She cannot meet her obligations to the Savings and Loans Service of UNESCO. She has found no other employment. Her right of residence in France is in doubt. She has accordingly claimed damages for both material and moral injury.

26. The Organization must adopt one of two options. One is to reinstate her and pay her full entitlements as from 1 February 1993 plus interest but less any sums she received by reason of termination, and to grant her an appointment for two years, again at grade P.4, from the date of this judgment. If the Organization does not adopt that option, it must pay her the equivalent of her salary and allowances for four years and six months at the rates prevailing at 31 January 1993, plus interest. She is also entitled to an award of half a million French francs in damages for the grave material and moral injury she has suffered and to an award of 50,000 francs in costs.

DECISION:

For the above reasons,

1. The Organization's decisions of 29 December 1992, 25 July 1994 and 10 November 1994 are quashed.

2. The Organization shall either, within sixty days of the date of publication of this judgment:

(a) reinstate the complainant at her former grade as from 1 February 1993 and up to the date of this judgment;

(b) pay her salary, allowances and any other benefits accordingly, less any indemnities she may have received on termination;

(c) pay her interest on all arrears at the rate of 10 per cent a year as from the dates at which they fell due; and

(d) grant her a contract of appointment for a period of two years from the date of this judgment at the same grade and in a post matching her qualifications and experience;

or, failing that:

(a) pay her damages in an amount equivalent to her salary and allowances for four years and six months at the rates prevailing at 31 January 1993, less any indemnities she may have received on termination; and

(b) pay her interest on the net amount at the rate of 10 per cent a year as from 20 December 1994, the date of correction of her complaint, up to the date of payment.

3. The Organization shall pay the complainant a total of 500,000 French francs in damages for material and moral injury.

4. It shall pay her 50,000 French francs in costs.

5. Her other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

Wm Douglas
William Douglas

E. Razafindralambo

Egli

A.B. Gardner
A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL

TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANISATION

ADMINISTRATIVE TRIBUNAL

EIGHTY-FIRST SESSION

In re TÖGL

Judgment 1554

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Dieter Tögl against the European Patent Organisation (EPO) on 14 February 1995 and corrected on 21 March, the EPO's reply of 12 June, the complainant's rejoinder of 10 September and the Organisation's surrejoinder of 1 December 1995;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Austrian, was employed by the European Patent Office, the secretariat of the EPO, at its sub-office in Vienna as an auxiliary staff member on its team in charge of CD-ROMs. He had two fixed-term contracts, one from 1 February 1992 until 31 January 1993, the other from 1 February 1993 until 31 January 1994. There being a two-year limit on the employment of auxiliary staff under a decision by the Administrative Council of 17 January 1986, his appointment was not extended further.

In April 1994 he applied for a vacancy advertised in the marketing department. On 9 August he learned from a letter which the Head of General Administration had sent him on 26 July that his application had not succeeded.

By a letter of 21 September he appealed to the President of the Office under Articles 106 to 113 of the Service Regulations for Permanent Employees against the "termination" of his appointment, alleging among other things improprieties in the procedure to fill the position in marketing.

On 1 October 1994 the Head of General Administration issued an order not to admit him to EPO premises. In a letter dated 19 October 1994 he asked the President to rescind that order.

By a letter of 24 November 1994 the Vice-President in charge of Directorate General 4 (DG4) rejected on the President's behalf the complainant's claims in his letters of 21 September and 19 October. That is the impugned decision.

B. The complainant submits that there were no "reasonable grounds" for employing him for a limited period: his post was a permanent one and his performance was satisfactory. The reason why his application for another position failed was that the Administration had a policy of discriminating against Austrians.

He claims the status of a permanent employee or, subsidiarily, reinstatement under a two-year contract and damages in the amount of two years' pay. He wants the Tribunal to quash the order banning him from the sub-office and award him [illegible]0,000 German marks in moral damages and 3,000 marks in costs.

C. In its reply the EPO contends that his complaint is clearly irreceivable. Although appeal to the Tribunal did lie against the non-renewal of his contract within ninety days of the date of its expiry, 31 January 1994, this complaint, not being filed until 14 February 1995, was out of time. Even if the internal remedies open to permanent employees had been available to him, his claims in his letter of 21 September 1994 to the President would again have been time-barred. As for his challenge to the recruitment procedure and to the order to keep him off the premises, he was not under contract with the Organisation at the time and so has no *locus standi*.

In subsidiary argument on the merits the Organisation says that the complaint is unfounded. Its reasons for taking him on as an auxiliary were sound and the annex to the contracts he signed stated that auxiliary staff could not stay on for over two years. He has produced no evidence of any flaws in the recruitment procedure. To ban him entering the sub-office's premises was a proper exercise of the Administration's prerogatives.

D. In his rejoinder the complainant disputes the EPO's pleas on receivability and develops his pleas on the merits.

E. In its surrejoinder the EPO presses its earlier arguments and refutes several points in the rejoinder.

CONSIDERATIONS:

1. By a decision dated 17 January 1986 and numbered CA/D 14/85 the Administrative Council of the EPO authorised the President of the Office to employ auxiliary staff under contract for periods not to exceed two years. That decision, which defines the conditions applicable to the contracts of auxiliary staff, makes no provision for such staff to bring an internal appeal under the Service Regulations for Permanent Employees. But Article 13 of the European Patent Agreement confers on them the right of appeal to the Tribunal.

2. The EPO employed the complainant at its sub-office in Vienna under two contracts concluded in accordance with decision CA/D 14/85, one for the period from 1 February 1992 to 31 January 1993 and the other from 1 February 1993 to 31 January 1994.

3. On 21 September 1994 he wrote the President a letter saying that his employment had been "illegally terminated" and the Office had not even called him for interview for a post he had applied for in April 1994. He asked the President to "withdraw the termination", acknowledge that he had been employed as a permanent employee, pay him compensation and treat his letter as a formal appeal under Articles 106 to 113 of the Service Regulations.

4. On 1 October 1994 the Head of General Administration gave instructions to the reception of the sub-office not to admit the complainant to the Organisation's premises in Vienna. The complainant wrote on 19 October asking the President to withdraw the instructions on the grounds that they were "unfounded" and prevented him from getting help from staff representatives.

5. On 24 November 1994 the Vice-President in charge of Directorate-General 4 replied to both his letters on the President's behalf. The Vice-President informed the complainant that the EPO could not extend his contract; the conditions of employment of auxiliary staff did not allow the filing of an internal appeal; though auxiliary staff had the right under Article 13 of the European Patent Agreement to appeal to the Tribunal, he had missed the time limit for lodging a complaint against the decision not to extend his contract; the procedure for filling the vacancy he had applied for was in line with the rules and other applicants had been better suited; and no outside applicant - such as he - might appeal to the Tribunal. The Vice-President refused his request for free access to the sub-office in Vienna but said that arrangements would be made

if he wished to consult local staff representatives. That is the decision he is impugning and he claims: recognition of his status as a permanent employee of the Organisation; reinstatement under a two-year contract of service; damages equivalent to two years' pay for the decision not to extend his appointment; withdrawal of the instructions to bar his entry to the EPO's premises in Vienna; 10,000 German marks in moral damages; and 3,000 marks in costs.

6. The Organisation pleads that insofar as the complainant is challenging non-renewal his complaint is irreceivable under Article VII(2) of the Tribunal's Statute because he failed to file it within ninety days of the notification of the final decision, whether express or implied, not to extend the contract which expired at 31 January 1994. It points out that two testimonials dated 28 January 1994 that it gave him were explicit that the Service Regulations of the EPO did not allow the extension of fixed-term contracts over two years. It argues that he should have filed a complaint within ninety days of 31 January 1994, not over a year later.

7. The complainant maintains that he was never given a copy of the decision, CA/D 14/85, which was cited on the first page of each of his two contracts, and so could not know that his only means of redress was a complaint to the Tribunal.

8. The Organisation retorts that if it was not appended to his contract it was up to him to ask for a copy. Besides, though he cited the provisions in the Service Regulations about internal appeals and therefore obviously knew about them, he failed even to meet the time limit for internal appeal, which was three months from the date of the decision adversely affecting him: in his case that was the date of expiry of his contract.

9. In his rejoinder the complainant points out that his complaint is directed not just against his "recruitment with an incorrect status, but against Contracts for Auxiliary Staff in connection with the filling of [his] position without advertising and selection procedure and discriminating [against his] additional application for a post in the marketing department". He says he was "used" in that he was expected to solve "organisational problems". He submits that "the time limit should not be deemed to have started until all the circumstances were known" to him. He argues that the earliest possible date for the start of the ninety-day limit is the rejection in the EPO's letter of 26 July 1994 of his application for the post.

10. The complainant is wrong in contending that for challenging the non-renewal of his contract the time limit of ninety days was somehow held over because of a connection with his application for a post. His complaint shows two distinct elements: the non-renewal of his contract on 31 January 1994 and his unsuccessful application for a post in April 1994. His failure to file a complaint with the Tribunal within ninety days of 31 January 1994 means that any claim in relation to his contract is time-barred. As for his application for a post, by the time he made it he was no longer an employee of the Organisation. Since an outside candidate for employment does not have access to the Tribunal his complaint is irreceivable in that regard as well. Lastly, his subsidiary objections to being barred from entry to the EPO's premises in Vienna also fail because once his employment had ended he lost his right to access.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Julio Barberis, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

Wm Douglas
William Douglas

Mella Carroll
Mella Carroll

Julio Barberis

A.B. Gardner
A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

EIGHTY-FIRST SESSION

In re VIEHBÖCK Judgment 1555

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Erich Viehböck against the European Patent Organisation (EPO) on 14 February 1995 and corrected on 23 March, the EPO's reply of 12 June, the complainant's rejoinder of 10 September and the Organisation's surrejoinder of 1 December 1995;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Austrian, was employed by the European Patent Office, the secretariat of the EPO, at its sub-office in Vienna as an auxiliary staff member in the publications department. He had two fixed-term contracts, one from 1 February 1992 until 31 January 1993, the other from 1 February 1993 until 31 January 1994. There being a two-year limit on the employment of auxiliary staff under a decision by the Administrative Council of 17 January 1986, his appointment was not extended further.

In April 1994 he applied for a vacancy at the sub-office which was the very job he had been doing. On 9 August he learned from a letter the Head of General Administration had sent him on 26 July that his application had not succeeded.

By a letter of 23 September he appealed to the President of the Office under Articles 106 to 113 of the Service Regulations for Permanent Employees against the "termination" of his appointment, alleging among other things improprieties in the procedure to fill the vacancy he had applied for.

On 1 October 1994 the Head of General Administration issued an order not to admit him to EPO premises. In a letter dated 19 October 1994 he asked the President to rescind that order.

By a letter of 24 November 1994 the Vice-President in charge of Directorate General 4 (DG4) rejected on the

President's behalf the complainant's claims in the letters of 23 September and 19 October. That is the impugned decision.

B. The complainant submits that there were "insufficient grounds" for employing him for a limited period: his post was a permanent one and his performance was satisfactory. The reason why his application for another position failed was that the Administration had a policy of discriminating against Austrians.

He claims the status of a permanent employee or, subsidiarily, reinstatement under a two-year contract and compensation in the amount of two years' pay. He wants the Tribunal to quash the order banning him from the sub-office and to award him 10,000 German marks in moral damages and 3,000 marks in costs.

C. In its reply the EPO contends that his complaint is clearly irreceivable. Although appeal to the Tribunal did lie against the non-renewal of his contract within ninety days of the date of its expiry, 31 January 1994, this complaint, not being filed until 14 February 1995, was out of time. Even if the internal remedies open to permanent employees had been available to him, his claims in his letter of 23 September 1994 to the President would again have been time-barred. As for his challenge to the recruitment procedure and to the order to keep him off the premises, he was not under contract with the Organisation at the time and so has no locus standi.

In subsidiary argument on the merits the Organisation says that the complaint is unfounded. Its reasons for taking him on as an auxiliary were sound and the annex to the contracts he signed stated that auxiliary staff could not stay on for over two years. He has produced no evidence of any flaws in the recruitment procedure. To ban him from entering the sub-office's premises was a proper exercise of the Administration's prerogatives.

D. In his rejoinder the complainant disputes the EPO's pleas on receivability and develops his pleas on the merits.

E. In its surrejoinder the EPO presses its earlier arguments and refutes several points in the rejoinder.

CONSIDERATIONS:

1. By a decision dated 17 January 1986 and numbered CA/D 14/85 the Administrative Council of the EPO authorised the President of the Office to employ auxiliary staff under contract for periods not to exceed two years. That decision, which defines the conditions applicable to the contracts of auxiliary staff, makes no provision for such staff to bring an internal appeal under the Service Regulations for Permanent Employees. But Article 13 of the European Patent Agreement confers on them the right of appeal to the Tribunal.

2. The EPO employed the complainant at its sub-office in Vienna under two contracts concluded in accordance with decision CA/D 14/85, one for the period from 1 February 1992 to 31 January 1993 and the other from 1 February 1993 to 31 January 1994.

3. On 23 September 1994 the complainant wrote to the President saying that his employment had been "illegally terminated", that the exact position he had filled in quality control had been advertised in April 1994 and that he had applied but the EPO had not even called him for interview. He asked him to "withdraw the termination", acknowledge that he had been employed as a permanent employee, pay him compensation and treat his letter as a formal appeal under Articles 106 to 113 of the Service Regulations.

4. On 1 October 1994 the Head of General Administration gave instructions to the reception of the sub-office not to admit the complainant to the Organisation's premises in Vienna. The complainant wrote on 19 October asking the President to withdraw the instructions on the grounds that they were "unfounded" and prevented him from getting help from staff representatives.

5. On 24 November 1994 the Vice-President in charge of Directorate-General 4 replied to both his letters on the President's behalf. The Vice-President informed the complainant that the EPO could not extend his contract; the conditions of employment of auxiliary staff did not allow the filing of an internal appeal; though auxiliary staff had the right under Article 13 of the European Patent Agreement to appeal to the Tribunal, he had missed the time limit for lodging a complaint against the decision not to extend his contract; the procedure for filling the vacancy he had applied for was in line with the rules and other applicants had been better suited; and no outside applicant - such as he - might appeal to the Tribunal.

The Vice-President refused his request for free access to the sub-office in Vienna but said that arrangements would be made if he wished to consult local staff representatives. That is the decision he is impugning and he claims: recognition of his status as a permanent employee of the Organisation; reinstatement under a two-year contract of service; damages equivalent to two years' pay for the decision not to extend his appointment; withdrawal of the instructions to bar his entry to the EPO's premises in Vienna; 10,000 German marks in moral damages; and 3,000 marks in costs.

6. The Organisation pleads that insofar as the complainant is challenging non-renewal his complaint is irreceivable under Article VII(2) of the Tribunal's Statute because he failed to file it within ninety days of the notification of the final decision, whether express or implied, not to extend the contract which expired at 31 January 1994. It points out that two testimonials dated 19 November 1993 and 12 January 1994 it gave him were explicit that the Service Regulations of the EPO did not allow the extension of fixed-term contracts over two years. It argues that he should have filed a complaint within ninety days of 31 January 1994, not over a year later.

7. The complainant maintains that he was never given a copy of the decision, CA/D 14/85, which was cited on the first page of each of his two contracts, and so could not know that his only means of redress was a complaint to the Tribunal.

8. The Organisation retorts that if it was not appended to his contract it was up to him to ask for a copy. Besides, though he cited the provisions in the Service Regulations about internal appeals and therefore obviously knew about them, he failed even to meet the time limit for internal appeal, which was three months from the date of the decision adversely affecting him: in his case that was the date of expiry of his contract.

9. In his rejoinder the complainant points out that his complaint is directed not just against his "recruitment with an incorrect status, but against Contracts for Auxiliary Staff in connection with the filling of [his] position without advertising and selection procedure and discriminating [against his] additional application for a post in the marketing department". He says he was "used" in that he was expected to solve "organisational problems". He submits that "the time limit should not be deemed to have started until all the circumstances were known" to him. He argues that the earliest possible date for the start of the ninety-day limit is the

rejection in the EPO's letter of 26 July 1994 of his application for the post.

10. The complainant is wrong in contending that for challenging the non-renewal of his contract the time limit of ninety days was somehow held over because of a connection with his application for a post. His complaint shows two distinct elements: the non-renewal of his contract on 31 January 1994 and his unsuccessful application for a post in April 1994. His failure to file a complaint with the Tribunal within ninety days of 31 January 1994 means that any claim in relation to his contract is time-barred. As for his application for a post, by the time he made it he was no longer an employee of the Organisation. Since an outside candidate for employment does not have access to the Tribunal his complaint is irreceivable in that regard as well. Lastly, his subsidiary objections to being barred from entry to the EPO's premises in Vienna also fail because once his employment had ended he lost his right to access.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Julio Barberis, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

Wm Douglas
William Douglas

Mella Carroll
Mella Carroll

Julio Barberis

AB Gardner
A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FIRST SESSION

In re LEPRINCE (No. 2)

Judgment 1556

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mrs. Georgette Leprince against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 20 November 1995, UNESCO's reply of 10 January 1996, the complainant's rejoinder of 30 January and the Organization's surrejoinder of 22 March 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant's career at UNESCO is summed up under A in Judgment 876 on her first complaint. At the material time she was employed as a secretarial assistant at grade G.6 in the office of the Assistant Director-General in charge of External Relations.

In March 1994 the Director-General announced a decision to transfer the Assistant Director-General for Culture to the Office of External Relations as from 1 June. By a memorandum of 15 June, which the complainant got the next day, the Director of the Bureau of Personnel (PER) told her that as from 20 June 1994 she would be transferred to the Office of the Assistant Director-General for Culture, whose secretary would be moving to her own post.

On 28 June she protested to the Director-General against his decision to transfer her. By a memorandum of 1 August the acting Director of Personnel told her that the Director-General upheld the decision. On 22 August 1994 she appealed to the Appeals Board. In its report of 27 June 1995 the Board held that her transfer had not been decided in the Organization's interests alone and impaired her career prospects. Since she did not want to go back to her old post the Board was not in favour of reversing the decision she had challenged, but it did recommend promoting her to grade P.3 by way of compensation. In a letter dated 28 August 1995, which she is impugning, the Director-General rejected her appeal.

B. The complainant submits that the impugned decision shows two procedural flaws. One is that she did not get the ten days' notice due under Manual item 2445 on transfer to another unit at headquarters. Contrary to what UNESCO made out in the internal proceedings, 2445 is still in effect since the checklist of the UNESCO Manual issued on 25 July 1994 contains a reference to it. So the Organization is bound by the provision under the patere legem rule. Besides, it referred to the period of notice in December 1994 when transferring someone else. The other flaw is that the Administration failed to consult the Junior Personal Advisory Board (JPAB) as item 2445 further requires.

The complainant charges the Organization with misuse of authority on the grounds that the only reason for transferring her was the wish of the new Assistant Director-General for External Relations to keep his secretary. She points out that a UNESCO official is allotted duties and is not allotted to a particular person. She denies the Organization's contention that her transfer was intended to give the Assistant Director-General for Culture, a new recruit, the help of "experienced" people like the complainant: the best way to do that would have been to keep on the secretary already there.

She wants the Tribunal to declare the impugned decision unlawful. Since the regrading of her old post was being "seriously considered" she claims 150,000 French francs in material damages for loss of promotion prospects and a further amount, to be determined, for loss of pension rights. She claims 50,000 francs in moral damages and 13,000 in costs.

C. UNESCO replies that it was she who started the dispute by demanding in a memorandum of 28 April 1994 that the then Assistant Director-General for Culture explain in writing how he saw her future.

UNESCO denies her charge of procedural flaws. Manual item 2445 had been obsolete since the issuance of a note on 19 February 1990. Though the authors of the checklist failed to explain that the reference to item 2445 was historical, that is a mere clerical oversight that the complainant may not rely on. Besides, even if 2445 had still been in force she is misconstruing what it says about notice and the JPAB. Paragraph C.2 is not about giving someone notice of transfer but about how soon the official's old unit must release him after transfer to a new one, failing agreement between the two units. According to paragraph 2445.A.3.b, "PER consults, as appropriate, departments, PABs [Personnel Advisory Boards], Joint Disciplinary Committees and the Directorate". The words "as appropriate" mean that only where the rules so require must the case go to a personnel advisory board. In the complainant's case they did not.

The Director-General made proper use of the discretion that the Staff Regulations and precedent allow him. There is "nothing odd in a senior officer's having at least one or two direct subordinates including a secretarial assistant"; indeed efficiency requires it. Nor does anyone have an acquired right to keep a post.

Lastly the Organization denies that upgrading the complainant's old post in the Office of External Relations was not being "seriously considered".

D. In her rejoinder the complainant submits that she never sought a dispute and she never demanded but just wanted to be told in writing what the Assistant Director-General for Culture had in mind for her. The Staff Regulations and Rules confer no privileges as to the assignment of staff on any category like "senior officers". The official who took the impugned decision acted ultra vires; though formally taken by the Director of Personnel on 15 June 1994 it had already been "conceived and put into effect" by the Assistant Director-General for Culture. Besides, the Director told her on 18 May 1994 that she would be kept on her post in External Relations.

Item 2445 does still apply and UNESCO's observing it in another case "estops" it from saying that the item is obsolete. A note it issued, on 19 February 1990, the date of the purported repeal of item 2445, says under item 2405 that "Transfers and promotions are covered by item 2445". She challenges UNESCO's reading of the words "as appropriate" in paragraph A.3.b of 2445: what they mean is that, according to circumstances, the administration shall consult either the departments, the personnel advisory boards, the Joint Disciplinary Committees or the Director-General. In her case it should have consulted a personnel advisory board.

She presses her pleas about misuse of authority and loss of hopes of the promotion that her fine record had led her to expect. "Rushing" her transfer through was offensive to her dignity.

E. In its surrejoinder UNESCO maintains that she picked a quarrel over her transfer, a decision taken solely in the Organization's interests. She was not happy anyway with her post in External Relations, or so it seems from a letter she wrote on 10 January 1989 to the Director-General and from her unwillingness to go back to it. So her complaint shows no cause of action. The impugned decision was taken by the competent official, the Director of the Bureau of Personnel. Item 2445 has been repealed and she misreads it anyway. It was just coincidence that item 2405 was adopted, with its reference to 2445, and 2445 was repealed at the same date. The complainant got due notice of her transfer, which she did not need to prepare for. Since her post was not to be upgraded she has lost no chance of promotion.

CONSIDERATIONS:

1. The complainant objects to her transfer from the Assistant Director-General of UNESCO for External Relations to the Assistant Director-General for Culture.

2. She joined the Organization in 1969, served until 1985 as secretarial assistant at grade G.5 in the Director-General's office, and then for three years with the Assistant Director-General for Social and Human Sciences. From March 1988 she was with the Assistant Director-General for External Relations. She was promoted to G.6 on 1 January 1991.

3. By a minute of 10 March 1994 the Director-General decided to reform the Bureau of External Relations and put Mr. Lopes, the then Assistant Director-General for Culture (ADG/CLT), in charge. On 28 April 1994 Mr. Lopes summoned the complainant and told her that he wanted her to switch jobs with his own secretarial assistant. By a memorandum of even date she asked him for a written explanation of what he had in mind; she also got in touch with the acting Assistant Director-General for External Relations and the Director of the Bureau of Personnel, saying she wanted to keep her post in External Relations.

4. By a memorandum of 15 June 1994 the Director of Personnel gave her notice of transfer as from 20 June to post CLT-139 as secretarial assistant to the Assistant Director-General for Culture. On 28 June she protested, but on 1 August the acting Director of Personnel replied that the Director-General had upheld his decision. She went to the Appeals Board, and on 27 June 1995 it recommended promoting her to P.3 and, if need be, raising to that grade her post as assistant to the Assistant Director-General for Culture. It did not

recommend reversing her transfer. In a letter of 28 August 1995 the Director-General rejected the Board's recommendation and her appeal, and that is the decision she is impugning.

5. Like appointment and promotion, transfer is at the discretion of the executive head of the international organisation and subject to only limited review. The Tribunal may interfere only if the decision was taken ultra vires or shows formal or procedural flaw or mistake of fact or law, or if some material fact was overlooked, or if there was misuse of authority or an obviously wrong inference from the evidence. And the Tribunal will be especially wary in reviewing a transfer since it may not replace the employer's rating of the official with its own.

6. The complainant pleads breach of due process, bad faith and misuse of authority. In her submission the breach of due process was in the failure to give her due notice and to consult the Junior Personnel Advisory Board. As to notice she cites item 2445.C of the Organization's Manual:

> "Upon transfer to another organizational unit at headquarters, a staff member is made available to that unit as follows:
>
> 1. Professional category: within 20 working days,
>
> 2. General Service category: within 10 working days,
>
> of formal approval of the personnel movement."

She says she got notice only on 16 June 1994 of the decision taken the day before to transfer her on 20 June, i.e. four days later. Although UNESCO gave the prescribed notice to someone else in the Culture Sector on transfer in December 1994, it did not apply the rule in 2445 to her.

7. The defendant demurs. It says that according to point 4 of Manual issue note 1310 of 19 February 1990 "item 2445 is obsolete and must be removed in revising Volume II of the Manual". As for the other transfer it made in December 1994, equality in law does not mean equality in the breach of it. Besides, the complainant is misreading 2445.C: it confers no right to notice of transfer.

8. Item 2445 did continue to apply after 19 February 1990. Manual issue note 1424 of 25 July 1994 includes an updated checklist of Manual provisions which is unchanged since the preceding one of 25 May 1993 and which still mentions item 2445. The item came in with Manual issue note 160 of 24 June 1966 and seems to have been the same ever since. The wording of item 2445 changed neither from 24 June 1966 until 25 May 1993, the date of the one checklist, nor from then until

25 July 1994, the date of the next one. Even though the note of 19 February 1990 said that item 2445 was to be dropped from the revised version of Volume II, it was not: indeed it was still there on 25 July 1994. So neither by 15 June 1994, the date of the decision to transfer the complainant, nor indeed, as UNESCO acknowledges by implication, by December 1994, the date of the other official's transfer, had item 2445 been dropped.

9. Yet the item does not help the complainant's case. Item 2445.C does set a time limit, but it is the time limit for the release of an official on transfer from one unit to another, not for the official to take up the new job. The official's former unit may be relieved of the duty to release in the circumstances provided for in the second clause of 2445.C, i.e. where transfer and promotion go together: in that case "the receiving unit may agree to lend the services of the staff member to the releasing unit, on a temporary basis beyond the specified period". The conclusion is that item 2445.C confers no entitlement tc notice of transfer.

10. The complainant argues that good faith required due warning of her transfer, and she cites a passage from Judgment 810 (in re Najman No. 5): "... What good faith requires is that when someone is transferred he should be given proper notice, and not just of a vague intention, but of the nature of the post he is to get and of the duty station".

11. That judgment was about a case of transfer from headquarters to a less senior post elsewhere, and so it was 2445.D that applied: "PER consults the staff member ... [after] which the transfer is approved". It was in those circumstances that the Tribunal held that there must be timely consultation. A transfer, like the complainant's, from one post to another at headquarters comes under 2445.C, which does not require such consultation.

12. In any event she may not plead want of due notice. On 28 April 1994 the Assistant Director-General for Culture told her that he would like her to switch posts with his secretarial assistant, and she herself, in her memorandum of 11 May to the Director of Personnel described the idea as a "sanction ... against me that could in no way be merited". Having been well aware as early as 28 April of the sort of post she was to get and of her duty station, she may not properly plead bad faith.

13. She is again wrong to contend that under 2445.A.3.b UNESCO had to consult the Junior Personnel Advisory Board before transfer. That provision is about transfer to a post at the same or at a lower grade and says: "PER consults, as appropriate, departments, PABs, Joint Disciplinary Committees and the Directorate". She is ignoring item 2400.E.4:

> "Transfers not involving any change of grade need not be referred to the PABs for consultation."*

Since the complainant's transfer meant no change in grade there was no need to bring in the Junior Personnel Advisory Board.

14. She argues that on the defendant's own admission 2400 no longer applied since it came into force at the same time as item 2445, i.e. in June 1966, and was therefore obsolete and irrelevant to her case. But if 2400 had disappeared along with 2445 she might not plead that it was obsolete by the date of the impugned decision since for the reasons given above the Organization would then have acted as if item 2400 still applied at that date. At all events, it appears from the Manual checklist of 25 July 1994 that item 2400 had been dropped by then. So the only surviving rule on personnel advisory boards was Staff Rule 104.1, which does not require consultation on transfer. The conclusion is that there was no need to consult the Junior Personnel Advisory Board on this case.

15. The complainant's last plea is misuse of authority. She says that the reason UNESCO gave for her transfer was the need to give a new recruit the help of someone experienced like herself, and that that reasoning was obviously wrong: as the Appeals Board held, the reason for her transfer was not solely the Organization's interests, and one year later UNESCO moved her yet again. So, in her view, the real reasons for transfer were improper.

16. A firm line of precedent precludes any presumption of misuse of authority: it must be proven on the evidence. Here the main reason that the Assistant Director-General, Mr. Lopes, gave for having the complainant switch jobs was his wish to keep his own secretarial assistant on taking up his new duties. That point of view squares perfectly well with the need to provide him with experienced help. Moreover, the complainant's further transfer one year later is irrelevant to the lawfulness of the one she is objecting to, the more so as she does not even plead, let alone prove, that the later one was unwarranted or fatally flawed. Under the circumstances, there are no grounds for supposing that UNESCO trumped up the reasons for the transfer.

17. The switch of jobs would have been unlawful only if the complainant had not been put on a post requiring the same level of skills and qualifications as the old one or had

---

* Registry's translation.

suffered material or moral injury. On that score she raises no objections. Since she fails to show that UNESCO's reasons for her transfer were wrong or that the transfer was improper, her plea of misuse of authority cannot succeed.

18. Since her main claims fail so do her claims to damages and to costs.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

(Signed)

William Douglas E. Razafindralambo Egli

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

EIGHTY-FIRST SESSION

In re SETHI

Judgment 1557

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Devendra Nath Sethi against the World Health Organization (WHO) on 2 June 1995 and corrected on 14 June, the WHO's reply of 21 September, the complainant's rejoinder of 31 October 1995 and the Organization's surrejoinder of 6 February 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Indian citizen who was born in 1939, joined the staff of the WHO's Regional Office for South-East Asia (SEARO) at New Delhi in 1962 under a temporary contract. He was an operator of air-conditioning equipment at grade ND.3. He was granted a fixed-term contract at ND.4 in 1963. He had several promotions, the last being a personal one in 1980 to the highest grade in the General Services category, ND.X, on an ND.8 post for an assistant in air-conditioning and electrical services. On completing 20, 25 and 30 years' service he was granted within-grade increments of two steps each. At the material time he was Head of the Air-conditioning and Electrical Sub-unit.

By a memorandum of 22 April 1993 he asked the Administration to reclassify his post under Manual paragraph II.1.210. A personnel officer replied in a memorandum of 9 July 1993 that the Regional Director would take a decision "very soon" after review of the air-conditioning sub-unit.

On 22 July 1993 the complainant appealed to the regional Board of Appeal against the Administration's failure to revise the description of his post and upgrade it to P.2/P.3. He alleged:

"(a) personal prejudice on the part of a supervisor or other responsible official ([Staff] Rule 1230.1.1)

(b) incomplete consideration of facts (Rule 1230.1.2)

> (c) failure to observe or apply correctly the provisions of Staff Regulations and Rules, or the terms of his contract (Rule 1230.1.3)
>
> (d) improper application of the WHO post classification standards (Rule 1230.1.4)"

In a report submitted to the Regional Director on 29 July 1994 the regional Board recommended rejecting the appeal. By a letter of 3 August 1994 the Regional Director told the complainant he had endorsed that recommendation.

The complainant having put the matter to the headquarters Board of Appeal on 8 September 1994, it too, in a report dated 14 February 1995, recommended rejection. The Director-General informed him in a letter of 12 April 1995, which he impugns, of the rejection of his claim.

B. The complainant submits that the impugned decision is unlawful. He pleads breach of WHO Staff Rule 230, which requires the Organization to review the classification of a post whenever the staff member so asks. The Organization failed to observe the procedure on the upgrading of posts to the Professional category. Instead it tried, out of sheer personal prejudice, to "dilute" his duties.

He wants the Tribunal to set aside the impugned decision and that of the Regional Director dated 3 August 1994; order the WHO to revise his post description and classification in keeping with the International Civil Service Commission's master standards; and award him (a) 100,000 United States dollars in damages, (b) the difference between the present amount of his pay and the sums he would have been paid had he held grade P.2 since 24 April 1993, plus interest, and $10,000 in costs.

C. In its reply the WHO argues that its refusal to reclassify his post was a lawful exercise of discretion. It carried out two classification reviews and both confirmed that ND.8 was the proper grade of the post. The reason why no new post description was made was the "legitimately-held" belief that the description of 1981 held good. The Organization denies the charges of personal prejudice and attempts to "dilute" his duties.

D. In his rejoinder the complainant presses his case and describes the WHO's treatment of him as "unequal and stepmotherly".

E. In its surrejoinder the Organization comments on the main points in the rejoinder and says that after giving his request "full" consideration it found no evidence of any change in the nature of his duties that might warrant putting his post in the Professional category.

CONSIDERATIONS:

1. In 1962 the complainant joined the WHO's Regional Office for South-East Asia (SEARO) at New Delhi under a temporary contract as an operator of air-conditioning equipment. He received a fixed-term appointment at grade ND.4 in 1963 and several promotions thereafter. On 1 June 1980 he was promoted to a grade ND.8 post as an assistant in air-conditioning and electrical services. He was also granted personal promotion to ND.X, the highest grade in the General Service category. He later became head of the Air-conditioning and Electrical Sub-unit, and he is objecting to the Organization's refusal to regrade his post to P.2/P.3.

2. The complainant made unsuccessful requests for the revision of the description and grade of his post. To one such request that he made in a memorandum of 19 August 1991, and pressed in reminders, the Personnel Division of SEARO replied in a memorandum of 14 September 1992 that his post had been "rightly graded" at ND.8. He wrote again on the subject on 30 October 1992, and again the Division replied, on 3 November 1992, confirming the description and grade of his post.

3. The WHO commissioned a consulting engineer to review, among many other matters, the air-conditioning system of SEARO. In February 1993 the engineer submitted a report headed "Facility survey and engineering study". He found the complainant's duties clearly to "exceed the normal responsibilities of a Chief Maintenance Engineer" and to be appropriate to a consulting engineer. The complainant referred to those comments in the report appraising his performance from 1 June 1992 to 31 May 1993. Under the heading "Self appraisal" he himself wrote:

> "Carried out all the activities as per post description [of 28 August 1981]. With the addition of latest equipment the system has become more complex and complicated. A revised [post description] has already been submitted ..."

His first-level supervisor agreed with the complainant's self-appraisal and said that the post description of 1981 needed revision and that a new one "will follow". His second-level supervisor agreed with the comments of the first-level one. Yet there came no new post description.

4. On 22 April 1993 the complainant made another request for revision of the description and grade of his post. The Personnel Division replied in a memorandum of 9 July 1993 that "a study of the new structure and post descriptions of the [Air-conditioning Sub-unit] has recently been completed", the recommendations made therein were under study by the Regional Director, and a decision was "expected very soon". Yet never was any such decision communicated to the complainant.

5. WHO Staff Rule 230 entitles a staff member to request at any time a review of the classification of his post, and WHO Manual paragraph II.1.130 sets out the following procedure for such review:

> "130 Requests for classifications and classification reviews are routed as follows:
>
> ...
>
> 130.3 ... for all regional general service posts ... to the regional personnel officer for processing in accordance with the regional procedures and submission to the regional director for decision.
>
> 130.4 For extended general service - EGSL - level posts in the regions: to the regional personnel officer for processing in accordance with the regional procedures and transmission to Personnel at headquarters for decision."

Manual paragraph II.1.200 confirms that it is the regional director who determines the grade of filled General Service posts in a regional office but that:

> "... upgrading to extended GS level or to a professional grade are decided by Personnel at headquarters."

Manual paragraph II.1.210 further provides:

> "A staff member may be assigned new duties not included in the post description on a full-time basis for a temporary period not exceeding 90 days. If the period exceeds 90 days, a new post description should be established and a classification review undertaken ... to determine the grade of the post."

6. Three months having elapsed, and having got no decision on his request for regrading, the complainant inferred a final refusal under Staff Rules 1230.8.1 and 1230.8.2 and on 22 July 1993 appealed to the regional Board of Appeal on the grounds set out under A above. The Tribunal need entertain

only one of his pleas, namely failure to apply correctly the relevant provisions of the Staff Regulations and Rules.

7. In its report the regional Board held by a majority that the complainant had not at any time been carrying out duties higher than those set out in the description of 1981 and that his supervisor had confirmed, year after year, that his duties and responsibilities were reflected adequately in that post description. In a cogent dissenting opinion dated 29 January 1994 one member observed that it was not for the Board to determine the adequacy of the post description; that the complainant's first-level supervisor had recognised the need to revise it; that the Administration had provided no evidence to show that any review had taken place after 90 days; that SEARO should have submitted the post description proposed by the complainant to headquarters for evaluation; and that by failing to do so it had denied him due process and violated the relevant provisions. By a letter of 3 August the Regional Director informed the complainant that he accepted the majority view and dismissed the appeal.

8. On 8 September 1994 the complainant appealed to the headquarters Board of Appeal on the same grounds. In answering his case the Administration conceded that his request for review, being supported by his supervisors, should have been forwarded to headquarters. But in its report of 14 February 1995 the Board held that, although the duties of the post might have so changed as to require revision of the 1981 description, the need for regrading did not follow:

> "Since the Regional Administration had decided that the post was correctly graded at ND.08, the Board considered that the Regional Administration was acting within its authority and was not required to forward the post description to the Headquarters Administration. However, the Board felt that this did not preclude further review and noted with satisfaction that the Headquarters Administration had requested the Regional Administration to forward a revised post description for classification review by Headquarters."

The Board recommended dismissing the appeal and the Director-General did so on 12 April 1995. That is the decision impugned in this complaint, which was filed on 2 June 1995.

9. On 10 March 1995 SEARO began drafting a revised description of the complainant's post. His supervisors and then the Regional Director approved it and on 11 May it was issued in final form under the title "Maintenance technician VI". Although the list of duties and responsibilities that it contained did differ in some respects from the description of 1981, the post was still graded ND.8. SEARO forwarded the new description on 29 May to headquarters, which after evaluation

concluded that the grading was correct. The Personnel Division of SEARO so informed the complainant by a memorandum of 24 July 1995.

10. The complainant contends that he had the right to apply under the Staff Rules and Manual for revision of the description and grade of his post but the WHO failed to recognise that right.

11. The Organization replies that though his workload might have increased he had not been assigned new duties. His request for reclassification was denied first by the Personnel Division of SEARO on the Regional Director's behalf, on 14 September and 3 November 1992, and by the Personnel Division at headquarters on 24 July 1995. The defendant says that there was no need to put the matter to headquarters for decision: first, because Manual paragraph II.1.130.3 authorises the Regional Director to decide on reviews of the grading of all regional posts in the General Service category; secondly, because the post description submitted by the complainant had not been approved by his supervisors. Anyway it made no difference whether the review was done at SEARO or at headquarters because after consideration in accordance with the established procedures the outcome was the same: no regrading. And any delay in review by headquarters was immaterial to that outcome.

12. What is relevant to this case is the request which the complainant made in April 1993. Though SEARO had rejected his earlier ones, that neither justified nor constituted denial of his request of April 1993. The request was a new one, supported by new material and made after his supervisors had for the first time acknowledged that the description of his post needed revising. Manual II.1.210 required that it be considered.

13. There is no merit in the WHO's contention that it had been considered at the regional level and at headquarters. It was because it was not considered at the regional level that the complainant had to appeal to the regional Board, properly inferring from that omission a final decision to refuse it. Belated consideration, whether at the regional level or at headquarters, after the conclusion of the internal appeals and after the taking of the impugned decision neither made good the failure to deal with his request at the proper time nor took from him his right to have the Tribunal review the decision now impugned.

14. The defendant's further plea that it was the Regional Director who was competent to decide on his request is based on an isolated reading of Manual paragraph II.1.130.3. That provision must be read with others, particularly Manual paragraph II.1.200, which make it clear that only headquarters

could decide on a request for the upgrading of a post from the General Service to the Professional category. Indeed the Administration conceded as much in its pleadings before the headquarters Board.

15. The Tribunal will not determine whether the complainant had new duties warranting changes in the description and grade of his post. But the impugned decision refusing his request was tainted with errors of fact and law and with failure to abide by the provisions of the Staff Rules and the Manual. It must therefore be quashed, and the complainant's request taken up anew.

16. Since the complainant was denied due process he is entitled to an award of damages for moral injury, and the Tribunal sets the amount at 2,500 United States dollars. It also awards him costs.

17. Because his complaint succeeds for the foregoing reasons there is no need to entertain his other pleas.

DECISION:

For the above reasons,

1. The Director-General's decision of 12 April 1995 is quashed.

2. The WHO shall process anew the complainant's request of 22 April 1993 for the regrading of his post.

3. It shall pay him 2,500 United States dollars in moral damages.

4. It shall pay him 500 dollars in costs.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

Wm Douglas
William Douglas

Mella Carroll
Mella Carroll

Mark Fernando

A.B. Gardner
A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

EIGHTY-FIRST SESSION

In re van DOREMALEN

Judgment 1558

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Johannes Cornelis Hendrikus van Doremalen against the European Patent Organisation (EPO) on 8 September 1995, the EPO's reply of 6 December, the complainant's rejoinder of 26 February 1996 and the Organisation's surrejoinder of 19 April 1996;

Considering the application to intervene filed by Mr. Johannes Vollering on 10 May 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, who is Dutch, joined the staff of the European Patent Office, the secretariat of the EPO, in May 1986 as a patent examiner at grade A2 in Directorate-General 1 (DG1) at The Hague. By a letter of 26 May 1993 the Director of Staff Policy informed him that the President of the Office had decided to initiate disciplinary proceedings to relegate him from step 8 to step 1 in his grade. The charges against him were, first, failing to return staff reports to the Personnel Department on time, secondly, taking unauthorised leave and failure to follow the correct procedures when applying for leave, and, thirdly, giving false information in weekly timekeeping reports.

In its report of 21 June 1993 the Disciplinary Committee upheld the first two charges but not the third and recommended relegation by two steps instead of seven. By a decision dated 13 August the President endorsed that recommendation.

By a letter of 15 November 1993 the complainant appealed against the sanction and the President put his case to the Appeals Committee. In its report of 2 May 1995 the majority recommended that the President should reverse the decision to lower his step, "reimburse" the difference in pay plus interest, "refer back" to his reporting officers his staff reports for 1988-89 and 1990-91, and consider transferring him to another directorate.

By a letter dated 12 June 1995, which he impugns, the Director of Staff Policy told him that the President had decided to reject his appeal.

B. The complainant submits that the President's decision is tainted with procedural flaws and, in any event, unfounded. The Administration failed to set up the Disciplinary Committee within the five-day limit in Article 98 of the Service Regulations; in breach of Article 103(3) the Committee failed to produce a signed transcript of testimony from a key witness; and the Administration failed to send the complainant a copy of the Committee's report within the time limit in Article 102(1). The Appeals Committee overlooked evidence before it and impaired his right to a hearing. There being no basis in fact for disciplinary action, the Organisation failed to discharge its burden of proof.

He seeks the quashing of the impugned decision, 10,000 guilders in moral damages and the same amount in costs.

C. In its reply the EPO maintains that the sanction was a lawful and proper response to the complainant's breach of Article 14(1) of the Regulations, which required him to act "solely with the interests of the European Patent Organisation ... in mind". The flaws he alleges in the disciplinary proceedings are either "non-existent" or without any effect on the Disciplinary Committee's findings.

D. In his rejoinder the complainant challenges allegations of fact on which the EPO - in his view - mistakenly rests its case. He presses his claims and further seeks the "reimbursement" of sums lost as a result of disciplinary action plus "compounded interest of 16%" a year.

E. In its surrejoinder the EPO says there is no new plea in the rejoinder that might warrant changing its position.

CONSIDERATIONS:

1. The complainant joined the staff of the EPO on 1 May 1986 as a patent examiner at grade A2. He is impugning a decision by the EPO to relegate him by two steps on the grounds of failure to act, as Article 14(1) of the Service Regulations requires, solely with the Organisation's interests in mind.

2. The Organisation charged him with failing to return the reports appraising his performance in 1988-89 and 1990-91 - his "staff reports" - which it had sent to him for signature; disregarding proper procedure in applying for leave, so that he was absent without permission on the mornings of 27 and 30 October 1992; and providing false information in weekly reports on time-keeping. A Disciplinary Committee was set up to inquire into those charges, to which the background was as follows.

3. On 14 November 1990 the complainant's supervisors had completed his staff report for 1988-89. The head of the Personnel Department sent him the report under cover of a letter dated 16 November 1990 asking him to sign and return it by 16 December. He says that he did so, the EPO that he did not. The EPO cites a reminder that the head of Personnel sent him on 11 November 1991 asking him to return the report at once "in order that this reporting procedure can be completed before the new period (1990-1991) begins". The Organisation argues that if the complainant had indeed returned the report by 16 December 1990 he would surely have pointed that out immediately. The complainant makes out that the reminder was in fact sent on 11 November 1990 and was misdated "1991". But that is quite implausible because it would mean that the EPO was asking him, on 11 November 1990, to return a report that it did not even send to him until 16 November 1990. The Disciplinary Committee rightly rejected his explanation and found that he had failed to return his report for 1988-89.

4. In the second half of 1992 the complainant enquired why the original handwritten draft of his staff report for 1990-91 had not been sent to him, although many of his colleagues had already received their staff reports. In reply to inquiries he sent on the subject on 7 September 1992 and 20 October his second-level supervisor wrote on 22 October that the report had already been sent but he would be getting a "certified copy". He says that on 27 October his supervisor gave him what he calls "a pile of copies" - none of them "certified" - of the draft of his staff report for 1990-91, but that he got no covering letter declaring the text to be authentic or

telling him what he was to do next. He did not return the report, though the head of Personnel sent him a reminder on 7 January 1993 saying that the deadline for his doing so had passed. He contends that because he had got neither the original text nor a certified copy of the report he was under no duty to take any further action. But the Disciplinary Committee rejected that explanation for his failure to return the report.

5. Article 63 of the Service Regulations, which is headed "Unauthorised absence", reads:

> "Except in case of sickness or accident, a permanent employee may not be absent without prior permission from his immediate superior ..."

EPO circular 22 also requires a staff member to submit a standard leave form "as early as possible to his immediate supervisor on or before the last working day". The Disciplinary Committee found that, though there was no agreed deadline, the complainant's supervisor had instructed him on 25 October 1991 to put in any request for leave soon enough to let the supervisor see it before the complainant actually went on leave. The Disciplinary Committee was unable to say whether the complainant's requests for the grant of leave on 27 and on 30 October were made before or after he took that leave, but it found that at any rate, even if made before, they had been too late for his supervisor to have duly received them in advance.

6. In its report of 21 July 1993 the Disciplinary Committee recommended relegating the complainant by two steps. By a letter of 13 August the President informed him that he accepted that recommendation and he appealed to the Appeals Committee on 15 November 1993. In its report of 2 May 1995 the Appeals Committee recommended by a majority reversing that decision on the grounds that:

> "(a) although the complainant had failed to return the two staff reports, the charges could not be maintained, because, in respect of the 1988-89 report, EPO neither gave him a second reminder nor warned him of the consequences of not returning it; and in respect of the 1990-91 report, EPO did not make it clear to him what he should do with the copy sent to him, and neither made a written request for his comments within a certain period nor followed up the matter, and

(b) although the failure to observe the correct procedure in applying for leave had been established, the finding of the [Disciplinary Committee] was vitiated by procedural errors."

The President did not accept the Committee's recommendation but rejected the complainant's appeal in a letter of 12 June 1995. That is the decision he is impugning.

7. Mr. Johannes Vollering, who defended the complainant before the Disciplinary Committee, has filed an application to intervene in the complaint on the grounds that the EPO has harmed his good name by making false, defamatory and insulting remarks about him in its surrejoinder. That matter falls outside the scope of the complaint before the Tribunal, whose ruling can have no bearing on Mr. Vollering's grievance. His application is therefore disallowed.

8. Since the close of the written submissions and the inclusion of the case in the list the complainant has applied for oral proceedings so that he may counter what he says are false allegations in the Organisation's surrejoinder, and he claims additional redress. That application too is refused.

9. It is beyond doubt that despite reminders the complainant failed to return the two staff reports. He knew full well that the original text of the second one was missing and that the process of appraisal was to continue with the copy he had been sent. If he had genuine doubts about the authenticity of that copy he should have asked for clarification, at least when he received the reminder of 7 January 1993 from the head of Personnel. The whole procedure of appraisal had been explained in circular 188 of December 1989, so that he needed no further reminders or warnings about the consequences of default.

10. As for the charge of taking unauthorised leave, the Disciplinary Committee felt unable, as is said in 5 above, to say whether the complainant had made his requests for leave before or after he actually took it. But it misread his supervisor's letter of 25 October 1991 as telling him how to apply for leave. All that the letter said was that it was unacceptable for him to forward a request for leave to his supervisor "knowing very well" that the supervisor would not see it until he had gone on leave. In any event the Committee's finding that he made his requests so late that his supervisor did not receive them in advance depended on the supervisor's own oral testimony to the Committee. The Committee's rules required that a signed transcript of such testimony should be available

before the Committee made its findings. Since that was not done, the Appeals Committee was right to take the view that there had been a procedural flaw.

11. Since a single punishment was imposed on the complainant for his failure to return the staff reports and for his taking leave without permission, the decision by the President of the Office must be quashed and the matter sent back to him for a decision on the disciplinary sanction to be imposed only for the failure to return the staff reports.

DECISION:

For the above reasons,

1. The decision of 12 June 1995 by the President of the European Patent Office is quashed.
2. The case is sent back to the President for a new decision on the disciplinary sanction to be imposed on the complainant.
3. The European Patent Organisation shall pay the complainant 1,000 guilders in costs.
4. His other claims are dismissed.
5. The application to intervene is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

Wm Douglas
William Douglas

Mella Carroll
Mella Carroll

Mark Fernando

A.B. Gardner
A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL

TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION

ADMINISTRATIVE TRIBUNAL

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FIRST SESSION

In re DURAND-SMET

Judgment 1559

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Jérôme Durand-Smet against the European Patent Organisation (EPO) on 3 July 1995 and corrected on 9 August, the EPO's reply of 25 October, the complainant's rejoinder of 30 November 1995 and the Organisation's surrejoinder of 8 February 1996;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant joined the EPO on 1 July 1980 as an examiner at grade A3 at Directorate-General 1 (DG1) of the Organisation's secretariat, the European Patent Office, at The Hague. In April 1983 he was transferred to Directorate-General 2 (DG2) in Munich. He was promoted to grade A4 on 1 May 1989.

In April 1991 he applied for a grade A5 post as member of a technical board of appeal in Directorate-General 3 (DG3).

By a letter of 20 December 1991 the Director of Personnel told him that his application had been unsuccessful. The appointment of Mr. P. Petti, another A3 official, was announced in communiqué 202 of 16 December and in the EPO Gazette of 9 March 1992. In 1993 the complainant applied, again unsuccessfully, for an A5 post. The report on his performance in 1992-93, which was notified to him on 20 June 1994, described him as fit to serve as a member of a board of appeal at grade A5 and thereby confirmed a handwritten remark that the reporting officer had made in the report for 1990-91.

On 15 July 1994 he wrote to the President of the Office relying on Article 49(7) of the Service Regulations, which requires an employee to complete two years' service in one grade in order to qualify for promotion to the next. He sought promotion to A5 as from 1 May 1991 and to A6 as from 1 May 1993 "even if it meant relegating Mr. Petti to A3". Having got no reply, he wrote a letter on 15 September 1994 to the President filing an internal appeal against implied rejection.

In its report of 12 April 1995 the Appeals Committee, to which the case had been referred, unanimously recommended rejecting his appeal as irreceivable on the grounds that he had not met the prescribed time limit for appeal. By a letter of 28 June 1995, the impugned decision, the Principal Director of Personnel informed the complainant that the President had rejected his appeal.

B. The complainant contends that his complaint is receivable. Article 49(7) of the Service Regulations says that promotion to a post in the next grade depends on performance reports among other things. So it was the notification to him on 20 June 1994 of the report for 1992-93 that set off the time limit of three months for appeal against the decision not to promote him to A5 and then A6. Besides, the EPO itself admitted in its reply of 23 January 1995 that his appeal was receivable.

He names five officials who he says were promoted to A5 without completing two years at A4, and four others, including Mr. Petti, who went straight from A3 to A5, whereas the Organisation refused him A5 after two years at A4. It discriminated against him.

He sees a breach of the rules in appointing to an A5 post as a member of a board of appeal an A3 or A4 examiner who has not completed two years in the grade. Promotion being "inextricably linked" to an appointment, the requirement of at least two years' service in one grade before promotion to the next applies also to the appointment of a member of a board of appeal, as provided for in Article 49(1) a) of the Service Regulations.

He asks the Tribunal to quash all the unlawful appointments and promotions, including Mr. Petti's, order his promotion to A5 as from 1 May 1991 and to A6 as from 1 May 1993 and award him at least 125,000 German marks in damages for serious injury and a sum in costs.

C. The EPO replies that the complaint is irreceivable, because the complainant has failed to exhaust the internal means of redress. For one thing, the quashing of the unlawful appointments and promotions was not part of the claim he put to the President on 15 July 1994; and for another, the three months were long over by the time he made his internal appeal against Mr. Petti's appointment, which was announced on 16 December 1991. He also failed to file his internal appeal within three months of the Organisation's letter of 20 December 1991 turning down his application for an A5 post. His claim to promotion to A6, being contingent upon his claim to promotion to A5, is irreceivable too. The Administration made a mistake in declaring his appeal receivable.

In subsidiary argument on the merits the Organisation rejects the complainant's allegations as unfounded. It sees a difference between appointment to "a" higher grade as a member of a board of appeal, provided for in Article 49(1) a) of the Service Regulations, and promotion to "the next higher grade", provided for in 49(7).

D. In his rejoinder the complainant still maintains that since appointment and promotion depend on performance he became entitled to apply for promotion to A5 upon notification to him of the report on his performance in 1992-93. His complaint is therefore receivable.

In his submission the requirements in Article 49(7) of the Service Regulations for promotion to the next grade apply also to any appointment of a member of a board of appeal that entails promotion.

E. The Organisation presses its pleas in its surrejoinder. It contends that the complainant may not rely on assessment in his performance report to plead that his complaint is receivable.

CONSIDERATIONS:

1. For a complaint to be receivable under Article VII(1) of the Tribunal's Statute the complainant must have exhausted all his internal remedies. The complainant's claim to the quashing of appointments he alleges to be unlawful - apart from Mr. Petti's - is irreceivable because he neither put it to the President of the Office nor made it part of his internal appeal.

2. His claim of 15 July 1994 made by implication a request to the President for the quashing of Mr. Petti's appointment as member of a technical board of appeal and for

appointing him instead. In its report of 12 April 1995, which the impugned decision cites, the Appeals Committee held that the complainant had failed to meet the time limit of three months for challenging both the rejection of his application, notified in a letter of 20 December 1991, and the appointment of Mr. Petti, announced in the Gazette of 9 March 1992. His claim to A6, which is a mere corollary of his claim to the quashing of those decisions, is irreceivable for the same reasons.

As the EPO observes, its Administrative Council appoints members of boards, and appeal against a decision by the Council lies to the Council itself under Article 106 of the Service Regulations. If the Council disallows such appeal, it puts the case to a committee set up ad hoc in accordance with Articles 109(1) and 110(3). So the President of the Office was not competent to rule.

At all events the complainant concedes that if the time limit ran from the date at which he had notice of the impugned decision his challenge was late. But he contends that it should run from 20 June 1994, when he learned from his staff report for 1992-93 that he was fit to serve on a board of appeal. The argument holds no water and he does not try to defend it. Since the decision was based on the facts as at December 1991, no later changes of fact could make any difference and warrant waiver of the time limit, even assuming that the other conditions of appeal were met.

3. As for his claim to promotion to A5 as from 1 May 1991 and to A6 as from 1 May 1993 "even if it meant relegating Mr. Petti to A3", the EPO sees it as a corollary of his implied claim to the quashing of Mr. Petti's appointment and of the rejection of his own candidature and as therefore out of time as well. The complainant does not see it that way.

In fact his claims to retroactive promotions to A5 and A6 are time-barred because he has failed to put them forward in the form of an appeal or a challenge to his grading.

Promotions may be granted, according to Article 49(2) of the Service Regulations, so far as vacancies allow. But the complainant has never applied for any vacancy or mentioned one that may have been available.

Nor does he suggest that the promotion he wants might have been granted to him in his present post. The purpose of his complaint is to get promotion by way of redress for the EPO's allegedly unlawful treatment. He pleads breach of its duty under Article 49(7) of the Service Regulations to confine promotions to "the next higher grade" within a category: instead of promoting Mr. Petti from A3 to A5 it should, he says, have granted the promotion to him. And that would have given him the benefit of all the rights he would have enjoyed if he had been appointed to a board of appeal.

The complainant might have put forward such pleas in support of a timely appeal against the result of the competition. His challenge is out of time and so irreceivable.

4. His claim to the quashing of decisions having failed, so do his other claims.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

(Signed)

William Douglas Michel Gentot Egli

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANIZATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FIRST SESSION

In re NDEDI Judgment 1560

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Miss Gisèle Ndédi against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 29 November 1995, UNESCO's reply of 27 January 1996, the complainant's rejoinder of 1 March and the Organization's surrejoinder of 5 April 1996;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a citizen of Cameroon who was born in 1958, held a traineeship with UNESCO in the Bureau of Personnel (PER) from May to September 1991. The Organization employed her under a supernumerary appointment in the Bureau of the Comptroller from February 1992 to September 1993. She then applied for a post - PER 239 - as a salary officer at grade P.3 in the Division of Staff Policy and Procedures (PPR) of the Bureau of Personnel.

A Senior Personnel Advisory Board (SPAB) looked into her qualifications and on 15 September 1993 recommended appointing her to post 239. The same day UNESCO granted her a supernumerary appointment for two months from 20 September.

In a letter of 18 November the chief of the recruitment section told her that the Administration had stopped the process of recruitment, the post having been upgraded to P.4.

But after speaking to the chief of PPR the Director-General told the Director of the Bureau of Personnel in a handwritten note dated 20 December 1993 that he was appointing the complainant to post 239. She was to hold grade P.3. The

Director having so asked in a memorandum of 4 January 1994, the Director-General agreed in the end to have the post re-advertised at P.4. In her memorandum the Director suggested, if no other vacancy could be found for the complainant, creating a suitable one for her in the Bureau. On 7 February 1994, she was put on another post, PER 238, as a planning officer at P.3 under a temporary appointment for six months. Her performance proved generally satisfactory in that period and she had the appointment extended by six months.

On 30 October 1994 UNESCO issued a notice of vacancy about the post she was temporarily holding. By a memorandum of 4 November she applied for it, purportedly "reserving all [her] rights".

The Chief of the Administration Division (PER/ADM) saw her on 25 January 1995 and said she would have her appointment extended, by only 22 days, to 28 February 1995. The same day he gave her written notice of his decision by means of a personnel action form. In a memorandum of 6 February a personnel officer confirmed the decision.

By a letter of 7 February the complainant appealed to the Director-General against the "three implied administrative decisions" in the memorandum of the 6th: the extension of her appointment to only 28 February; the refusal to convert her temporary appointment into a fixed-term one; and the refusal to confirm her appointment to post 238. Having got no reply within the time limit of one month in the rules, she went to the Appeals Board on 8 March.

The Board reported on 3 July 1995. Citing the Director-General's handwritten note of 20 December 1993 and the memorandum of 4 January 1994 from the Director of Personnel, it held that the refusal to extend her appointment beyond 28 February 1995 was at odds with the Director-General's instructions. So it recommended reversing that decision and seeing whether the temporary appointment should be extended or converted into a fixed-term one.

In a letter of 10 October 1995, which she impugns, the Director-General upheld the "decision not to extend the temporary appointment beyond 28 February 1995 and not to convert it into a fixed-term one".

In a letter of 21 December 1995 UNESCO informed her that she had not been appointed to post 238.

B. The complainant submits that the impugned decisions were ultra vires: the Director-General had by a note of 21 November 1994 delegated authority to the Assistant Director-General, who was not free to delegate further: delegatus non potest delegare.

She sees bad faith in UNESCO's failure to fulfil its "implied promise to put her where she would have been had she got post 239". Instead of terminating her appointment it should have applied Rule 104.8(b), which says that: "A temporary appointment may, at the discretion of the Director-General, be extended, or converted to a fixed-term appointment ..."

She further pleads, among other flaws, failure to give reasons for the impugned decisions and to consult the SPAB, misuse of authority, and breach of equity and natural justice.

She seeks the quashing of the decisions; reinstatement as from 1 March 1995 in post 238 or another at grade P.3 under a two-year appointment as from the date of the judgment or, failing that, a fixed-term appointment; an award of 100,000 French francs in material and moral damages and costs, which she puts at 30,000 francs.

C. UNESCO replies that there were no implied decisions not to convert her temporary appointment into a fixed-term one or not to confirm her appointment to post 238. According to precedent no decision may be implied unless a formal claim has been put to the Administration. The complainant put none.

The Organization objects on the merits to her challenge to the decision to extend her appointment to 28 February 1995. It never promised her post 239. The process of selection had to stop because reasons of policy required the upgrading of the post to P.4. The Organization never promised her a permanent appointment on post 238 or a fixed-term appointment, even supposing that the Director-General's consent to creating a P.3 post for her might be treated as a promise.

The challenged decisions were not ultra vires. Precedent acknowledges the delegation to be the ordinary means of exercising administrative authority. Besides, the Director-General said in a note of 26 February 1988 that the authority he had delegated to the Assistant Director-Generals should flow down from top to bottom.

Under Staff Regulation 4.3.2 staff are recruited so far as possible by competition. Paragraph 20 of administrative circular 1722 of 8 November 1990 says that a temporary appointment may be converted into a fixed-term one only after following the ordinary procedure for recruitment to vacancies.

So no personal prejudice prompted the decision to put post 238 up for competition.

Lastly, UNESCO says that Rule 104.1(b)(iii) laid no duty on it to consult the SPAB, the complainant not having spent more than a total of 12 months under temporary contract in UNESCO's employ in the last two years.

D. In her rejoinder the complainant observes that the memorandum of 6 February 1995 confirming the extension to 28 February 1995 also contained the two "implied decisions" she referred to in her appeal of 7 February 1995 to the Director-General. The Director-General's silence implicitly confirmed all three. She disagrees that there can be no implied decision unless the official has first lodged a formal claim. Besides, the Director-General's letter of 10 October 1995 confirming the decision not to convert her appointment into a fixed-term one proves that there had indeed been such a decision.

The delegation of the Director-General's authority related only to the programme for 1988-89: that is plain from another note of the Director-General's dated 14 December 1987. The plea that the complainant's appointment could not be converted into a fixed-term one is wrong in law. The Director of Personnel herself said, in her minute of 11 January 1994 to the acting Deputy Director-General, that she wanted to avoid the process of recruitment by appointing the complainant to post 238. Lastly, the complainant seeks the disclosure of information about the grant of appointments to temporary employees and the conversion of such appointments into fixed-term ones.

E. UNESCO presses its pleas in its surrejoinder. The Director-General's silence meant no more than rejection of her appeal against the decision not to extend her appointment beyond 28 February 1995. The consequences - and they were not decisions as such - were that her appointment was not converted into a fixed-term one and she was not put on post 238. The downward flow of authority by delegation is consistent practice at UNESCO in all areas. The Organization is under no duty to give reasons for a decision not to extend a temporary appointment. By saying in her memorandum of 11 January 1994 that she did not want a process of recruitment the Director of Personnel was merely affording justification for the grant of the temporary appointment.

CONSIDERATIONS:

1. The complainant studied law at the University of Paris I, where she obtained a degree in law and a master's degree in law in 1984.

From May to September 1991 she was a trainee with UNESCO at its headquarters in Paris in the operational projects section of the Division of Management and Administration. In February 1992 she took up duty under a supernumerary contract in the Bureau of the Comptroller at grade G.2, step 3. From 5 February to 5 May 1993 UNESCO advertised a competition for a grade P.3 post, PER 239, for a salary officer in the Division of Staff Policy and Procedures (PPR). The complainant applied. On 15 September 1993 the Senior Personnel Advisory Board (SPAB), to which the matter had been referred, recommended her for the post. Also on 15 September she was granted a further supernumerary appointment for two months from 20 September 1993. A letter of 18 November informed her of a decision to upgrade the post from P.3 to P.4 and to halt the process of selection. On 20 November she left UNESCO.

In a handwritten note of 20 December 1993 to the Director of the Bureau of Personnel the Director-General said that, as the Advisory Board had recommended, he was appointing the complainant to post 239. But it is not alleged, let alone shown, that she had formal notice of the decision or even heard of it. On 21 December the Chief of Staff Policy and Procedures spoke by telephone to the Director-General. In a memorandum of 4 January 1994 the Director of Personnel told the Director-eneral that she thought the complainant under-qualified for the technical requirements of the post. The process of selection was accordingly stopped so that the post could be upgraded to P.4. With the Assistant Director-General's approval a new competition was announced, the deadline for applications being 8 February 1994. The Director-General was invited: (a) to go ahead with the process of selection; (b) to consider other positions for the complainant; and (c) if no vacancy could be found to establish a P.3 post for her in the Bureau of Personnel. The Director-General wrote "OK" against (a) and (c). Again it is neither alleged nor proven that the complainant had notice of the text at the time.

In a memorandum of 11 January 1994 to the acting Deputy Director-General the Director of the Bureau of Personnel suggested reviving another post, PER 238, for the complainant and she went on:

> "In order to act as quickly as possible and avoid the recruitment procedure, I propose to appoint Ms. Ndedi on the above-mentioned post on a temporary basis for a preliminary period of six months."

The acting Deputy Director-General having agreed, the complainant was offered appointment to post 238 as a grade P.3 planning officer for six months from 7 February 1994. She accepted the offer; though the appointment was temporary, she hoped it might later be changed to a fixed-term one. Her performance was rated C on a scale ranging from A (exceptional), B (very good), C (satisfactory) and D (acceptable) down to E (unsatisfactory). She was told the rating on 30 June 1994 and said she was not challenging it. She got a six-month extension of appointment from 7 August. The Organization put post 238 up for competition by a notice it issued on 30 October. On 4 November she applied. At a meeting of 25 January 1995 she learned that the Bureau of Personnel was to end her temporary appointment. She commented in a memorandum of 26 January 1995 and got a reply of even date. By a memorandum of 6 February a personnel officer confirmed that the Organization would not be keeping her on after 28 February 1995 and told her about arrangements for separation. In a letter of 7 February she appealed to the Director-General to reverse the decision on compassionate grounds. She said she inferred three decisions:

> one, not to extend her appointment beyond 28 February 1995:
>
> another, not to convert her temporary appointment into a fixed-term one;
>
> and a third, not to confirm her appointment to post 238.

In her submission those decisions showed procedural and substantive flaws.

She left the Organization for good on 28 February 1995.

On 10 April UNESCO interviewed her for post 238. The Senior Personnel Advisory Board reported on 30 October: the majority recommended someone else. On 21 December 1995 the Organization told the complainant that she had not been successful but that other posts were up for competition in which she might be interested. The Director-General appointed the recommended candidate. It is neither alleged nor proven that the complainant challenged those decisions.

In its report of 3 July 1995 the Appeals Board recommended putting the records to the Director-General in view of the instructions he had already given for handling of the case. The Board was also in favour of converting her temporary appointment into a fixed-term one.

By a letter of 10 October 1995 the Director-General informed her that he was upholding his decision not to extend her temporary appointment or convert it into a fixed-term one.

He advised her to watch out for announcements of suitable vacancies.

2. The parties disagree about what the purport of the challenged decision is in law. In the complainant's view it consists of a decision not to extend her temporary appointment beyond 28 February 1995 and of implied decisions not to convert it into a fixed-term one and not to confirm her appointment to post 238. In its reply UNESCO says that there were no such implied decisions.

That the Director-General did rule expressly on the first two matters is plain enough from the wording of his decision of 10 October 1995, and it would be in bad faith to deny that. But the complainant could not reasonably construe his decision as refusing to appoint her to post 238: that depended on the outcome of the competition which she had entered, which was not over by the date of filing this complaint. Since she has failed to exhaust her internal remedies that matter is irreceivable under Article VII(1) of the Tribunal's Statute and the present ruling will be confined to the first two points.

3. The complainant asks the Organization to say how often it has stopped a competition in order to change the duties of the vacant post and regrade it. There is no need for evidence on that score since the issue is not decisive: if the procedure is lawful it is immaterial how often UNESCO may have followed it before: see 6 below.

4. The complainant had a temporary appointment. The Staff Regulations and Rules distinguish such an appointment both from a permanent and a fixed-term one and from a traineeship and supernumerary employment. It differs in particular from a fixed-term appointment in that it is expected from the outset to be a fairly short stint, with no more than a few brief extensions, whereas the fixed-term appointment is commonly extended and may even afford the basis of a career in the Organization: see Judgments 1116 (in re Diallo) under 5 and 444 (in re Alexis) under 1. Thus Rule 104.8 reads:

> "(a) A temporary appointment shall be an appointment for a continuous period of less than one year, ending on a date specified in the Letter of Appointment.
>
> (b) A temporary appointment may, at the discretion of the Director-General, be extended, or converted to a fixed-term appointment; it shall not, however, carry any expectation of, nor imply any right to, such extension or conversion and shall, unless extended or converted, expire according to its terms, without notice or indemnity."

Administrative circular 1722 of 8 November 1990, which is about "Temporary help and outside experts", says:

> "17. A temporary appointment is an appointment for a continuous period of at least six months and less than one year, including extensions ...
>
> ...
>
> 19. The total duration of temporary appointments, including any extensions, offered to an individual by all units of the Secretariat may not exceed 24 months within a period of 35 consecutive months.
>
> 20. A temporary appointment may no longer be directly converted into a fixed-term appointment. Such a conversion will only take place after appointment to a vacant established post following normal recruitment procedures. This measure is necessary to ensure that all permanent staff members are recruited through open and competitive procedures."

5. The complainant's first plea in support of her claim to the quashing of the impugned decision is that the official who decided not to grant her an extension beyond 28 February 1995 - the chief of the Administration Division (PER/ADM) - acted ultra vires for want of proper delegation of authority.

The plea is receivable: see, for example, Judgments 292 (in re Molloy) under 18, 869 (in re Hill), 1184 (in re Mangeot) and 1185 (in re Mermier). But it is devoid of merit.

In a note dated 26 February 1988 the Director-General invited senior officers to delegate in turn whenever circumstances so warranted. By note 95/45 of 21 November 1994 the Director-General delegated authority to extend an appointment to the Assistant Director-General for Management and Administration (ADG/MA), who in turn delegated it to the Director of the Division of Personnel (PER) in a minute of 25 November 1994. By a minute of 19 January 1995 the Director empowered the chief of the Administration Division (PER/ADM) to take such decisions.

The complainant contends on various grounds that such delegation was either improper or of no effect.

Two of her arguments are: delegatus delegare non potest, and the Director-General's note of 26 February 1988 applied to an earlier period. They fail. The authority delegated in this case was for the taking of administrative decisions, not for the approval of rules. As was held in Judgment 805 (in re Aras and others), delegation is the ordinary way of exercising authority, and the larger the administration the more authority must be passed down. Though the Director-General's note of 26 February 1988 was about the programme for 1988-89, the heading - "Efficiency in the secretariat" - and the substance of it show his intent not to confine it to that period. So there was nothing wrong with the further delegation at the material time of authority to take administrative decisions.

The complainant further pleads that the Assistant Director-General could not properly delegate authority on 25 November 1994 because the delegation to himself by the Director-General did not take effect until 1 December 1994. There is no substance to the plea: obviously the further delegation became valid as soon as delegation by the Director-General took effect.

True, further delegation by the Assistant Director-General did not cover "delicate cases" and the complainant says that hers was such a case. But there was no abuse of the Bureau of Personnel's discretion in not treating her case as a delicate one: it fell squarely within current practice and the rules about expiry of a temporary appointment and possible conversion into a fixed-term one.

She further contends under this head that not only was her case a delicate one but for the sake of formal consistency it should have gone to the Director-General himself for a decision since he had himself ordered her appointment to post 238. The Tribunal is not satisfied on the evidence that it had been the Director-General's own decision to grant her a temporary appointment even though he had so ordered. In any event, since the appointment was temporary it was obviously seen as short-lived, and the refusal to extend was not a reversal of the appointment; there was no need for the same person to act and the Bureau of Personnel did not go against the Director-General's wishes. Indeed the Director-General confirmed its decision by his later rejection of her appeal.

Her last argument is that the Director of the Bureau had delegated to the chief of the Administration Division authority only to grant an extension of appointment or promotion, not to terminate an appointment. That is a mere quibble: the grant of an extension means that the appointment will expire at the end of the further period; refusal of it means that it will expire anyway. So the chief of division did not act ultra vires.

6. The complainant next pleads misuse of authority by the Director of the Bureau of Personnel and endorsement of it by her superiors. In the complainant's submission there were no reasonable grounds for the impugned decision; its purpose was to do her down and favour someone else, and as proof she

cites the rejection of her applications for posts 239 and 238, and the identity of the successful applicant for 238.

Yet what the Organization did appears lawful.

The competition for post 239 was stopped when the Bureau of Personnel came to the view that it required highly technical skills and that the complainant was not fit for it. For the sake of efficiency it was thought best to raise the requirements, upgrade the post and announce a new competition. That was in line with Manual provision 2415.D.7(d). The complainant has not argued, let alone shown, that those were not the true reasons. So her plea of misuse of authority fails.

Her temporary appointment to post 238, which she has not challenged, appears in no way improper. It was in the Organization's interests not to put her for good on the post because it might find someone better by competition. And the grant of the temporary appointment gave her no rightful expectancy of later appointment.

As for the competition, the complainant not only did not challenge it but actually entered it. The procedure complied with circular 1722, the purpose of which is beyond reproach.

Ending her temporary appointment after just over a year was also in keeping with the nature and purpose of such appointments, especially since the post was to be filled by another sort of appointment.

Lastly, although she failed in the end to get post 238, UNESCO says - and she does not demur - that the reason was that she did not have full command of English and French. So it was only reasonable for the Director-General to pick someone else.

The plea fails.

7. The complainant is again mistaken in contending that UNESCO gave her no reasons for its decision. She learned them when she saw the chief of the Administration Division and from the ensuing correspondence: time had already gone by; the post had already been put up for competition, she had applied for it; and she had as good a chance of winning as anyone else. Those explanations of UNESCO's reasons were sufficient to let her see where she stood and how she might proceed if she so wished.

8. Staff Rule 104.1(b) reads as follows:

> "The Personnel Advisory Boards, each for the category of staff with which it is concerned ... shall give advice on the ... renewal of temporary appointments of staff members

whose successive contracts exceed twelve months during the two preceding years."

Where the rules require consultation of an advisory board the formal requirement must be met before any decision is taken: see Judgment 1525 (in re Bardi Cevallos), also delivered this day.

The complainant maintains that the Senior Personnel Advisory Board ought to have been consulted and that because it was not the decision is flawed. UNESCO answers that the rule did not apply because in "the two preceding years, i.e. 1993 and 1994", she did not have "successive temporary contracts" of a total duration of over 12 months.

UNESCO is construing the rule to make the words "during the two preceding years" mean the two preceding calendar years. That construction is wrong: what the text must be referring to is the two full years - 730 or 731 days - immediately before the material date. Only that construction obviates the risk of discrimination where decisions occur at different times of the calendar year. It appears right also because Rule 104.8(a) defines a temporary appointment as one "for a continuous period of less than one year" and because the lapse of time in the current year must count.

The relevant appointments are obviously temporary ones, not traineeships or supernumerary contracts, and the relevant date is the one at which the appointment is to end or beyond which the extension is to be granted. It is immaterial whether further extension is granted before the appointment eventually ends.

On that interpretation of Rule 104.1(b)(iii) consultation of the Senior Personnel Advisory Board was unnecessary because the complainant had held temporary appointments for fewer than twelve months.

The complainant's plea is devoid of merit.

9. She pleads bad faith on the grounds that stopping the competition for post 239 after the Advisory Board had recommended her was intended to prevent her getting it, and putting her on post 238 instead gave her rightful expectations of the permanent appointment she would have got if the Bureau of Personnel had not interfered; so she could expect to get an equivalent appointment.

As was held in Judgment 782 (in re Gieser) under 1, good faith requires an organisation to keep a promise subject to certain conditions: the promise must be substantive, i.e. to act or not to act or to allow; it must come from someone competent or deemed competent to make it; the breach of it must cause injury to the person who relies on it; and the position in law must not have altered between the date of the promise and the date at which fulfilment is due. It does not matter, however, what form the promise takes.

Here there is no inkling of any promise UNESCO may have made and failed to keep. Comments that various officials may have made about the complainant's case are immaterial inasmuch as they were never addressed to her on the Organization's behalf. She had no right to appointment to post 239, only to compliance with the rules of the competition. Understandably enough, stopping the competition, proper though it was, upset her, the more so since the Senior Personnel Advisory Board had recommended her; and, understandably too, the Director-General was willing to help out by letting her have eventually the temporary appointment. She was happy enough to have it at the time and indeed did not demur. But that was all she got: UNESCO made her no promise, either to convert her appointment into a permanent one or to do anything else. It was UNESCO's policy and sound management to try to get the most competent possible staff by means of competition. That is the policy underlying circular 1722 on the conversion of temporary appointments. So the complainant was not entitled to infer from UNESCO's treatment of her any promise that she would eventually get another sort of appointment.

It is, moreover, worth observing that she did not demur at UNESCO's putting post 238 up for competition.

Since she has failed to show the existence of a promise, her plea fails.

10. She submits that the decision not to renew her appointment caused her such serious injury by damaging her future career as to be treated as unlawful or at least to warrant damages.

Under Staff Rule 109.7(g)(ii) no termination indemnity shall be payable to a staff member whose temporary appointment expires at the date set in the letter of appointment: see Judgment 1114 (in re Romain) under 11.

In any event the complainant's reasoning is at fault. Though she doubtless suffered distress, the Organization is not to blame. The appointment it gave her, being temporary, offered her no promise whatever of any more lasting one. She must have realised that UNESCO could not have granted her a longer appointment without first reviewing her case. It was only to be expected, and indeed only reasonable, that it would put the posts up for competition, even though she already held one of them on a temporary appointment. Disappointed though she must have been by the interruption of the competition to fill post 239, for which she had the Advisory Board's recommendation, she had no firm assurance of getting it until the decision to fill the vacancy was taken. There was no breach of the material rules. Nor may UNESCO be held liable for not putting her permanently on post 238 without competition or - after the impugned decision - for her not winning the competition.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

(Signed)

William Douglas E. Razafindralambo Egli

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATIO

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FIRST SESSION

In re BOLAND (No. 7)

THE ADMINISTRATIVE TRIBUNAL,

Considering the seventh complaint filed by Mr. Pierre Boland against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 29 June 1995 and corrected on 26 October 1995 and Eurocontrols reply of 9 February 1996;

Considering that by a facsimile letter of 15 March 1996 the complainant informed the Registrar of the Tribunal that he wished to withdraw suit;

Considering that in its letter of 18 April 1996 to the Registrar the Agency expressed no objection to the withdrawal of suit;

Considering that suit is unreservedly withdrawn;

DECISION:

The withdrawal of suit is hereby recorded.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

(Signed)

William Douglas Michel Gentot Egli

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FIRST SESSION

In re BOLAND (No. 8)

THE ADMINISTRATIVE TRIBUNAL,

Considering the eighth complaint filed by Mr. Pierre Boland against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 29 June 1995 and corrected on 26 October 1995 and Eurocontrols reply of 9 February 1996;

Considering that by a facsimile letter of 15 March 1996 the complainant informed the Registrar of the Tribunal that he wished to withdraw suit;

Considering that in its letter of 18 April 1996 to the Registrar the Agency expressed no objection to the withdrawal of suit;

Considering that suit is unreservedly withdrawn;

DECISION:

The withdrawal of suit is hereby recorded.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

(Signed)

William Douglas Michel Gentot Egli

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

EIGHTY-FIRST SESSION

In re PAULSSEN

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Robert Johannes Hubertus Paulssen against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 13 May 1995 and corrected on 30 May, Eurocontrol's reply of 11 August and the complainant's rejoinder of 12 September 1995;

Considering that by a letter of 13 November 1995 the complainant informed the Registrar of the Tribunal that he wished to withdraw suit;

Considering that by a letter of 24 November 1995 the Organisation said it had no objection to the withdrawal of suit;

Considering that suit is unreservedly withdrawn;

DECISION:

The withdrawal of suit is hereby recorded.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

Wm Douglas

William Douglas Michel Gentot Egli

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FIRST SESSION

In re SUNNHAGEN

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Anders Bernt Axel Sunnhagen against the European Patent Organisation (EPO) on 13 November 1995 and corrected on 8 March 1996;

Considering that by a letter of 4 April 1996 counsel informed the Registrar of the Tribunal that the complainant wished to withdraw suit;

Considering that in its letter of 16 April 1996 to the Registrar the Organisation expressed no objection to the withdrawal of suit;

Considering that suit is unreservedly withdrawn;

DECISION:

The withdrawal of suit is hereby recorded.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

(Signed)

William Douglas Michel Gentot Egli

A.B. Gardner

ISSN 0378-7362

If this address is wrong, please return this sheet to the sender or, at least, the part bearing the address

Pour tout changement d'adresse, prière de renvoyer à l'expéditeur cette feuille ou, du moins, la partie comportant l'adresse

Sírvase indicar el cambio de dirección del destinatario y enviar esta hoja al remitente, o al menos la parte en que está escrita la dirección

INTERNATIONAL LABOUR OFFICE
BUREAU INTERNATIONAL DU TRAVAIL
OFICINA INTERNACIONAL DEL TRABAJO
CH-1211 GENÈVE 22

P. P.
1211 GENÈVE 22